

Note

Agency Lawyers' Answers to the Major Questions Doctrine

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This Note addresses two questions: how does the major questions doctrine affect the way agency lawyers advise policymaking clients, and how does that advice affect agency statutory interpretation and regulation? I first describe the doctrine and discuss normative theories for the role agency lawyers should play in statutory interpretation. Second, I consider the effects the doctrine had during the rulemaking, litigation, and rescission of the Clean Power Plan (CPP), the first ever federal regulation of power plants' greenhouse-gas emissions. Finally, I identify four major concerns with the doctrine's ex ante effects on agency statutory interpretation and regulatory processes. These critiques apply broadly, beyond the CPP.

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Introduction

“We expect Congress to speak clearly if it wishes to assign to an agency decisions of vast economic and political significance.”¹

On their own, those words—written by Justice Scalia for the Supreme Court majority in the 2014 case *Utility Air Regulatory Group v. EPA (UARG)*—seem like common sense. But rather than merely a call for clarity, those words have come to represent a controversial legal idea: the major questions doctrine. Though only debatably a formal legal doctrine given that the Supreme Court has never explicitly announced such a doctrine in a majority opinion,² the theory can be stated as follows: while courts will generally defer to administrative agencies’ interpretations of ambiguous statutes, where there is a question of “vast economic and political significance,”³ Congress needs to have spoken clearly in delegating such decisions to agencies. Where Congress has not spoken clearly on those issues, courts have the final say and often hold that agencies are acting beyond their statutory mandate.⁴

Given the large number of agency regulatory decisions that could theoretically meet these criteria, the major questions doctrine might entirely remake the manner in which Congress delegates authority to agencies, agencies regulate, and courts review those regulations. The major questions doctrine’s impact on the third area—the way courts review regulations *ex post*—has begun to receive scholarly attention. But there has yet to be significant scholarly discussion of the second area—how the major questions doctrine impacts the way agencies regulate *ex ante*. Beginning to fill that void in the literature is the primary objective of this Note. In particular, this Note aims to describe the way agency lawyers, who play a prominent but undertheorized role in executive-branch statutory interpretation, understand the major questions doctrine and how they advise agency policymakers in light of it.

In service of these aims, I consider as a case study one of the most significant environmental rulemakings since *UARG*—the Clean Power Plan

1. *Util. Air Regulatory Grp. v. EPA (UARG)*, 573 U.S. 302, 324 (2014) (quoting *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 160 (2000)).

2. *See infra* Section I.A.

3. *UARG*, 573 U.S. at 324.

4. *See infra* Section II.F.

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(CPP).⁵ The CPP aimed to regulate carbon-dioxide emissions from existing electric power plants for the first time in the country's history, based on authority in the Clean Air Act (CAA). The CPP was proposed and finalized under President Obama in 2014 and 2015 respectively, litigated at the U.S. Court of Appeals for the D.C. Circuit in 2016, and rescinded under President Trump in 2017.⁶ I argue that the CPP rulemaking, litigation, and rescission raise at least four significant concerns about the major questions doctrine's ex ante impact on agency lawyers, agency statutory interpretation, and regulation.⁷ These concerns apply broadly when the major questions doctrine is invoked beyond the CPP context and build on ex post concerns that have been raised in the existing literature. Moreover, they should be of concern regardless of one's prior views on the role of the administrative state and regardless of whether one is a textualist or a purposivist.

First, rather than serving as an objective and nonideological tool of statutory interpretation, the major questions doctrine, as it has been applied, incentivizes agency lawyers to privilege deregulatory statutory interpretations over proregulatory ones. This privileging has occurred in rulemakings when agency lawyers limit the novelty of a regulation, even if that regulation, as proposed, is within the statute's text and purpose. Privileging has also occurred in rescissions because, to date, agency lawyers have not relied on the major questions doctrine to check bold deregulatory executive action—even though an objective understanding of the doctrine suggests it could apply with equal force to proregulatory and deregulatory interpretations. The doctrine's lack of objectivity should trouble committed textualists, as much as it does those in favor of purposive statutory interpretation.

Second, the major questions doctrine takes interpretive authority away from agency lawyers because it forces them to spend more time determining what constitutes a major question under a vague standard than working to understand and identify Congress's intended purpose, a role they are uniquely situated to play within the separation of powers scheme. Critically, this focus on litigation risk occurs even when the litigation risk bears no relation to the statute's text or purpose, but instead to a highly subjective interpretive canon such as the major questions doctrine.

5. By significant here, I refer both to the projected economic benefits and costs of the regulation, and to the public salience of the support and criticism the regulation received.

6. As discussed in Part II, the EPA just recently finalized a replacement for the CPP, following both a proposed repeal and a proposed replacement.

7. These ex ante concerns build on the ex post concerns with the doctrine that Professor Lisa Heinzerling identified within Professor William Eskridge's normative framework for evaluating the legitimacy of canons of statutory interpretation. See William N. Eskridge Jr., *The New Textualism and Normative Canons*, 113 COLUM. L. REV. 531, 576-82 (2013) (evaluating canons of statutory interpretation based on their contribution to rule-of-law values, democratic values, and "unquestionably cherished" public values); Lisa Heinzerling, *The Power Canons*, 58 WM. & MARY L. REV. 1933, 1937 (2017) (criticizing the major questions doctrine for, among other things, its lack of objectivity, predictability, and failure to promote democratic and public values).

Third, the doctrine has provided an easy tool for regulated-party commenters to exploit agency lawyers' incentives and move regulations in a deregulatory direction by raising any colorable argument that a regulation is of economic or political significance. However, the doctrine has not provided such a tool to those other than regulated parties, including regulatory beneficiaries or those representing broad and diffuse interests.

And fourth, the doctrine forces agency lawyers to guess whether judges will deem their action to implicate a major question. The Supreme Court has not clearly defined the term, and some judges use the major questions doctrine to express policy, rather than legal, preferences. This definitional ambiguity has an even more corrosive effect on agency deliberative processes and agency lawyers' roles within the separation of powers scheme than a clearly defined major questions doctrine would.

In this Note, I focus on these *ex ante* concerns with the major questions doctrine in the context of the CPP because that rule was a notice-and-comment rulemaking with a publicly available administrative record, agency legal memoranda, and partial litigation record. However, these concerns are by no means limited to this one rulemaking. In fact, since *UARG*, the district courts and courts of appeals have invoked the major questions doctrine in nine cases. These cases include some of the most high-profile administrative-law cases across policy areas, including cases like *Texas v. United States*,⁸ *Chamber of Commerce of the United States v. U.S. Department of Labor*,⁹ and *Nevada v. U.S. Department of Labor*.¹⁰ Moreover, all nine cases share common features and a common structure with the CPP rulemaking, such that the CPP can serve as a representative case study of major-questions-doctrine cases.¹¹ In an era of political gridlock, presidential-driven regulatory policymaking is only likely to grow, including in areas outside of environmental policy. If the courts continue to rely on the major questions doctrine, the critical role agency lawyers play within these rulemaking processes will deteriorate further, leading to less deliberative processes and statutory interpretation that is less comprehensive—rather than interpretation that properly relies on a range of tools, including text, purpose, textual canons, and substantive canons.

This Note proceeds as follows: Part I sets the stage for this Note's analysis of the *ex ante* effects of the major questions doctrine by first describing the

8. 809 F.3d 134, 181 (5th Cir. 2015) (arguing that, if the Court had invoked *Chevron* analysis in evaluating President Obama's Deferred Action for Parents of Americans (DAPA), it would have struck down the program under *Chevron* step 2 because DAPA "implicates 'questions of deep economic and political significance'").

9. 885 F.3d 360, 380-81, 387 (5th Cir. 2018) (finding that the Department of Labor's fiduciary rule is unreasonable under *Chevron* step 2 because, among other reasons, "it took DOL forty years to 'discover' its novel interpretation" and because "DOL has made no secret of its intent to transform the trillion-dollar market for IRA investments, annuities and insurance products").

10. 218 F. Supp. 3d 520, 530 n.5 (E.D. Tex. 2016) (arguing that the "great economic and political significance" of the Department of Labor's overtime rule under President Obama further bolstered the argument that it should fail at *Chevron* step 1).

11. See *infra* Section II.F.

doctrine. I then describe the institutional design of the executive branch and the role of executive branch lawyers within that structure in order to later assess the doctrine's effect on agency lawyers, who represent a subset of executive branch lawyers. Although agency lawyers aim to minimize litigation risk, I explain how they are uniquely situated to serve as the executive branch's purposive statutory interpreters—a role that even committed textualists may welcome them playing in limited circumstances and that the major questions doctrine significantly inhibits.

Part II considers the effects of the major questions doctrine on the CPP rulemaking, litigation, and repeal. In particular, I discuss how the doctrine affected agency lawyers in two regards. First, the doctrine ultimately led agency lawyers to interpret the relevant statute in a manner that focused on a very narrow reading of the text, which could have resulted in more modest emissions reductions. Second, in doing so, the doctrine paradoxically led agency lawyers in the CPP context towards an outcome that limited the Environmental Protection Agency's (EPA) ability to regulate in response to new environmental protection concerns—contrary to the CAA's broadly acknowledged purpose. Critically, this restriction did not occur under a traditional understanding of textualism with objective interpretive canons. And it occurred even though agency lawyers' initial textual, purposive, and proregulatory statutory interpretation was on strong footing under *Chevron*. I then contrast the care with which the major questions doctrine led agency lawyers to approach the CPP rulemaking with the lack of care agency lawyers believed was required of them during the CPP repeal and conclude that this kind of disparate treatment between proregulatory and deregulatory rulemakings is typical of the major questions doctrine's effect on agency lawyers. And finally, I compare the CPP rulemaking with all of the recent circuit- and district-court cases that have cited the major questions doctrine. That comparison suggests that the CPP is largely representative of these recent cases, even if it is somewhat difficult to fully disentangle the effects of the major questions doctrine from broader litigation risks.

In Part III, I detail the four significant *ex ante* concerns with the major questions doctrine discussed *supra*.

In Part IV, I address counterarguments that both enthusiastic and reluctant proponents of the major questions doctrine raise, with a specific focus on how the CPP case study reveals serious flaws in these arguments. Based on this analysis and its application in the CPP context, I argue that the Court should abandon the doctrine in its current form, especially since it has not announced it in a clear or predictable way. Beyond simply abandoning the doctrine, I also recommend ways to cabin some of the most troubling *ex ante* impacts of the major questions doctrine, including ways the Court could better define what constitutes a major question. But assuming the Court continues to rely on the doctrine, I also discuss legislation that would allow the political branches to reclaim the interpretive authority that they are better equipped to hold.

I. The Major Questions Doctrine and the Role of Agency Lawyers

This Part begins by discussing the Supreme Court’s development of the major questions doctrine in response to criticisms of *Chevron*, including the criticism that it violates the *Marbury v. Madison* principle that courts, rather than agencies, “say what the law is.”¹² Before shifting to an analysis of the ex ante effects of the major questions doctrine on agency lawyers, I describe the institutional framework in which agency lawyers operate. I argue that, in response to presidential-driven regulatory policy, executive-branch lawyers are generally court-centered and aim to minimize litigation risk. In addition, I theorize that, due to their unique expertise, agency lawyers (a subset of executive-branch lawyers) should serve as the executive branch’s purposive statutory interpreters. I argue that even committed textualists may support this view in limited circumstances. This normative theory of agency lawyers sets the stage for my later discussion of the ex ante effect of the major questions doctrine on those lawyers. There, I argue that the doctrine compromises agency lawyers’ ability to play the constitutionally constructive role my institutional analysis suggests they should play.

A. Development of the Major Questions Doctrine

*Chevron v. NRDC*¹³ has been the subject of extensive academic and judicial commentary, ranging from its novelty,¹⁴ to its efficiency and accountability advantages,¹⁵ to what some believe are grave separation of powers concerns.¹⁶ Against this backdrop, the major questions doctrine is typically viewed as one of several attempts to limit *Chevron*.¹⁷

12. *Marbury v. Madison*, 5 U.S. 137, 177 (1803).

13. 467 U.S. 837 (1984).

14. See, e.g., Cass R. Sunstein, *Chevron Step Zero*, 92 VA. L. REV. 187, 189 (2006) (arguing that *Chevron* defied the *Marbury v. Madison* principle and declared that “in the face of ambiguity, it is emphatically the province and duty of the administrative department to say what the law is”).

15. See, e.g., Jacob E. Gersen & Adrian Vermeule, *Chevron as a Voting Rule*, 116 YALE L.J. 676, 689-90 (2007) (painting *Chevron* deference as a largely efficiency-maximizing “voting rule”); Richard J. Pierce, Jr., *Reconciling Chevron and Stare Decisis*, 85 GEO. L.J. 2225, 2229-30 (1997) (discussing the political accountability of agencies as agents of the President); Kenneth W. Starr, *Judicial Review in the Post-Chevron Era*, 3 YALE J. ON REG. 283, 309-10 (1986) (highlighting the practical benefits of *Chevron* related to agency expertise within the federal government); Cass R. Sunstein, *Beyond Marbury: The Executive’s Power to Say What the Law Is*, 115 YALE L.J. 2580, 2580 (2006) (arguing that agencies are generally well positioned to interpret ambiguous statutes because of their “comparative expertise and accountability”).

16. See, e.g., *Michigan v. EPA*, 135 S. Ct. 2699, 2712-14 (2015) (Thomas, J., concurring) (criticizing *Chevron* as inconsistent with separation of powers principles and *Marbury v. Madison*); *Gutierrez-Brizuela v. Lynch*, 834 F.3d 1142, 1158 (10th Cir. 2016) (Gorsuch, J., concurring) (arguing in an unusual opinion concurring with his own majority opinion that, without *Chevron*, courts would be able to “fulfill their duty to exercise their independent judgment about what the law is”); see also *Pereira v. Sessions*, 138 S. Ct. 2105, 2121 (2018) (Alito, J., dissenting) (referring to *Chevron* as a precedent that has become “increasingly maligned”).

17. See, e.g., Heinzerling, *supra* note 7, at 1937 (arguing that the major questions doctrine, in addition to requirements that the agency be an expert in the field and consider the costs of regulation,

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Scholars have pointed to *MCI Telecommunications Corp. v. AT&T*¹⁸ in 1994 as the Supreme Court's first suggestion of the major questions doctrine.¹⁹ There, the Court held that the Federal Communications Commission lacked authority to exempt certain carriers from regulation under its statutory authority to "modify" filing requirements for carriers because, according to the Court, it was "highly unlikely that Congress would leave the determination of whether an industry will be entirely, or even substantially, rate-regulated to agency discretion."²⁰ In 2000, the Supreme Court more explicitly suggested a major questions doctrine—without making clear the centrality of that doctrine to its holding. The Court held that the Food and Drug Administration lacked the authority to regulate tobacco, notwithstanding its broad statutory authority to regulate "articles (other than food) intended to affect the structure or any function of the body."²¹ According to the Court, it defied "common sense" that Congress would "delegate a policy decision of such economic and political magnitude to an administrative agency."²² Finally, the major questions doctrine was more explicitly invoked in 2014, with Justice Scalia writing for the majority in *UARG*.²³ There, the Court rejected, at *Chevron* step two, EPA's argument that, because the agency had classified as a "single air pollutant" the "combined mix" of greenhouse gases that contribute to climate change,²⁴ it could require stationary-source greenhouse-gas emitters to obtain permits under the CAA as facilities that emit "any air pollutant."²⁵

Describing the doctrine with more specificity is difficult because the Court has not set forth a coherent overarching definition and tends to not clearly announce to what extent a decision relies on the doctrine versus other traditional interpretive canons. For example, in a 2016 article, Professor Nathan Richardson attempted to analyze what constitutes a major question, in the Supreme Court's view, settling on four major factors: a "major shift in

constitute "power canons" of statutory interpretation that aim to take "interpretive power from an administrative agency.").

18. *MCI Telecomms. Corp. v. AT&T*, 512 U.S. 218, 231 (1994).

19. 512 U.S. 218 (1994); see Nathan Richardson, *Keeping Big Cases from Making Bad Law: The Resurgent Major Questions Doctrine*, 49 CONN. L. REV. 355, 364 (2016) (beginning a discussion of the major questions doctrine with *MCI*).

20. *MCI Telecommunications*, 512 U.S. at 231.

21. *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 126 (2000) (quoting 21 U.S.C. § 321(g)(1)(C) (2018)).

22. *Id.* at 133.

23. *UARG*, 573 U.S. at 322.

24. *Id.* at 311 (citing Greenhouse Gases Under Section 202(a) of the Clean Air Act, 74 Fed. Reg. 66516 (2009)).

25. *Id.* at 316 (citing 42 U.S.C. § 7479(1) (2018)).

regulatory scope,”²⁶ “economic significance,”²⁷ “political controversy,”²⁸ and “thin statutory basis,”²⁹ all of which are difficult to define precisely.

B. Executive-Branch Institutional Design and the Role of Agency Lawyers

Before analyzing the major questions doctrine’s ex ante effects on agency lawyers, it is necessary to understand the institutional design of the executive branch, the lawyers within it, and the role those lawyers should play in the constitutional separation of powers scheme. In subsequent Parts, I will argue that the major questions doctrine inhibits agency lawyers’ ability to play the constitutionally constructive role this Section theorizes they should play.

Presidential-driven regulatory policymaking began under Presidents Reagan and Clinton³⁰ and has only become more pronounced with political gridlock. Some scholars have raised separation of powers concerns regarding the enhanced role of the President in regulatory decision-making.³¹ Others have argued that lawyers within the executive branch serve as a necessary check on the abuse of presidential power.³² The lawyers who most frequently advise policymaker clients on statutory interpretation, judicial doctrines, and the legality of regulatory options are agency general counsels (GCs). Agency lawyers, who generally work in executive-branch agencies as part of agency GC offices, are undertheorized in the legal literature. But it is logical that they play such an important role in agency statutory interpretation and regulation. Unlike their agency policymaking colleagues, they are lawyers with presumed legal expertise. And unlike their Department of Justice (DOJ) colleagues in the Office of the Solicitor General (SG) or the Office of Legal Counsel (OLC)—whose incentives and behaviors are far more theorized in the legal literature—agency lawyers are physically proximate to agency policy officials and have subject matter expertise that DOJ lawyers typically lack. Still, there are at least four reasons to believe that the literature on the SG’s office and OLC also

26. *Id.* at 381.

27. *Id.*

28. *Id.* at 383.

29. *Id.* at 384-85 (arguing that this factor is particularly unclear, referring not to ambiguity but rather a much less legally defensible idea, “the length of the relevant text,” and contending that “[i]f an agency asserts authority based on a single, short provision, the major questions . . . doctrine seems more likely to apply”).

30. Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2281-82 (2001) (arguing that building on President Reagan’s efforts, President Clinton “developed a set of practices that enhanced his ability to influence or even dictate the content of administrative initiatives”).

31. *See, e.g.*, Harold H. Bruff, *Presidential Power and Administrative Lawmaking*, 88 YALE L.J. 451, 451 (1979) (stating that the modern administrative state’s regulatory process has “challenged the effectiveness of the checks and balances designed by the Constitution”).

32. *See, e.g.*, Jon D. Michaels, *An Enduring, Evolving Separation of Powers*, 115 COLUM. L. REV. 515, 556 (2015) (arguing that administrative lawyers provide an effective counterweight to the President and political appointees, and that they are part of a system resembling the constitutional separation of powers system).

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applies to agency GCs, while there is at least one reason to suspect agency GCs face somewhat different incentives than those lawyers.

First, all three offices are within the executive branch, with the dual goal of representing executive-branch policymaker clients and broader rule of law interests. Like the SG, agency GCs are sometimes responsible for litigating agency interests and disputes *ex post*.³³ Second, like OLC, agency GCs are responsible for advising executive-branch policymakers *ex ante* as they craft agency regulations. Third, agency GCs, like the SG and OLC, are highly incentivized to take a risk-averse approach to statutory interpretation. Then-Professor Cornelia Pillard has suggested that the SG and OLC are motivated by, among other factors, “a court-centered view of constitutional law” in order to “reduce risks of damaging losses” in court.³⁴ The same can likely be said of agency GCs, who share a similar incentive structure: courts decide whether agency actions are lawful, and agency lawyers want to reduce the risk that courts will hold agency actions unlawful. And fourth, as presumed experts on the law and the statutory interpretation, agency GCs likely hold implicit authority within their agencies similar to the authority that the SG’s office and OLC hold within the executive branch generally. As Pillard and others have noted, these lawyers “speak[] with a level of authority that [their] clients overwhelmingly respect.”³⁵

However, in contrast to SG and OLC lawyers, agency GCs are on the frontlines of interpreting statutes. As a result, they can and should become experts over time in their agency’s statutory mission, as determined by Congress.³⁶ While OLC tends to get involved in highly contentious statutory-interpretation issues and apply various trans-substantive canons of statutory interpretation, agency GCs are likely involved to some degree in every agency rulemaking and statutory-interpretation issue. For example, agency GCs may work to ensure multiple agency regulations fit together in a manner consistent with Congress’s broad statutory purpose, not just the text of a specific provision. Their sense of the cohesive regulatory structure is an institutional strength that not only courts but also OLC and other nonagency executive branch lawyers likely lack. As Professor Jerry Mashaw has written, unlike courts and other executive-branch lawyers, “agencies have a direct relationship with Congress that gives them insight into legislative purpose[] and meaning”;

33. For example, once a regulation is promulgated and then challenged in court, an agency GC may assist the DOJ in defending the lawfulness of the regulation. Moreover, in certain cases, the agency GC may even serve as litigation co-counsel to DOJ.

34. Cornelia T. Pillard, *The Unfulfilled Promise of the Constitution in Executive Hands*, 103 MICH. L. REV. 676, 730 (2005); see also Margaret H. Lemos, *The Solicitor General as Mediator Between Court and Agency*, 2009 MICH. ST. L. REV. 185, 205 (“[T]he SG injects a legalistic, court-centered perspective into agency decisionmaking, filtering agency arguments through a quasi-judicial screen so as to prepare them for presentation to the Court.”).

35. Pillard, *supra* note 34, at 685; see also Lemos, *supra* note 34, at 204.

36. Kevin M. Stack, *Purposivism in the Executive Branch: How Agencies Interpret Statutes*, 109 NW. U. L. REV. 871, 877 (2015) (arguing that “regulatory statutes require agencies to engage in purposive interpretation and that agencies have relatively strong capacities to do so”).

for an agency to “ignore its institutional memory, would be to divest itself of critical resources in carrying out congressional design.”³⁷ And as Professors Cass Sunstein and Adrian Vermeule have written, “attention to institutional considerations can show why agencies might be given the authority to abandon textualism even if courts should be denied that authority.”³⁸ Whereas OLC serves as a check on the agency in ensuring it does not exceed its specific statutory authority, agency GCs have the dual role of checking the agency and ensuring that statutory grants of authority are adaptable to new regulatory problems.³⁹ And agency and OLC lawyers playing distinct roles that are consistent with their respective institutional strengths—with agency lawyers serving as purposive statutory interpreters and OLC as narrower interpreters—should help agencies gain a more comprehensive understanding of statutory purpose and text on the most difficult statutory interpretation questions.

Beyond the theoretical justifications for why agency GCs should play a purposive role in statutory interpretation, empirical analysis suggests that agency lawyers largely see their roles this way in practice. Professor Christopher Walker’s 2015 article based on survey results from “128 agency officials whose primary duties included statutory interpretation and rulemaking”⁴⁰ reveals at least two widely held views of agency lawyers that broadly support this proposition. First, 76% of survey respondents reported that “in general, legislative history is a useful tool for interpreting statutes,”⁴¹ and 93% perceived that the purpose of legislative history was to “explain the purpose of the statute.”⁴² Combined, those results indicate that agency lawyers interpreting statutes believe part of their job is understanding Congress’s purpose. Second, while only 56% of respondents reported a belief that ambiguities or gaps in a statute relating to “major policy questions” constitute an intentional delegation by Congress,⁴³ 75% “indicated that Congress intends for federal agencies to fill gaps or ambiguities relating to the agency’s own jurisdiction or regulatory authority.”⁴⁴ And “jurisdictional questions” or ambiguity surrounding the agency’s jurisdiction are often the sources of a

37. Jerry L. Mashaw, *Norms, Practices, and the Paradox of Deference: A Preliminary Inquiry into Agency Statutory Interpretation*, 57 ADMIN. L. REV. 501, 511 (2005).

38. Cass Sunstein & Adrian Vermeule, *Interpretation and Institutions*, 101 MICH. L. REV. 855, 928 (2003).

39. While legal scholars have widely questioned OLC’s ability to provide the President and the executive branch neutral advice on national security policy, see, e.g., Arthur H. Garrison, *The Role of the OLC in Providing Legal Advice to the Commander-In-Chief After September 11th: The Choices Made by the Bush Administration Office of Legal Counsel*, 32 J. NAT’L ASS’N ADMIN. L. JUDICIARY ISS. 2 (2012), such criticism has not focused on climate policy specifically or domestic policy generally.

40. Christopher Walker, *Inside Agency Statutory Interpretation*, 67 STAN. L. REV. 999, 1004 (2015).

41. *Id.* at 1038.

42. *Id.* at 1041.

43. *Id.* at 1055.

44. *Id.* at 1058.

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major policy question in the first place—though it was not in the CPP context.⁴⁵

Based on the theoretical justification for and the empirical analysis of agency lawyers as purposive statutory interpreters, for this Note, I adopt the framework of agency lawyers described *supra*: like other executive-branch lawyers, agency GCs rely primarily on judicial doctrines in order to minimize litigation risk, and they do so from a position of power and importance within their agencies and the executive branch. However, they play an important and distinct role in the separation of powers scheme when they employ a more purposive approach to statutory interpretation.

While the remainder of this Note assumes that agency lawyers should be, and do in fact see themselves as, purposive statutory interpreters, one need not hold this view generally in order to conclude that the major questions doctrine has the negative *ex ante* effects on agency statutory interpretation and regulation that are discussed in this Note. For example, one might argue that certain statutes are specific enough in their delegation that they envision agency lawyers as strict textual interpreters. When, however, statutes delegate more open-ended authority to an agency, even those who do not accept the view that agency lawyers should be purposive statutory interpreters generally may be sympathetic to the idea that agency lawyers, more than other executive-branch lawyers or courts, are well situated to consider statutory purpose in addition to other methods of statutory interpretation.

The most committed and influential textualists acknowledge that there are certain statutes that are broad enough or ambiguous enough that some interpreter—whether an agency lawyer, other executive-branch lawyer, or a judge—will have no choice but to look beyond the text and the formalist, trans-substantive canons of interpretation.⁴⁶ In these cases, who is best positioned to do so and why? Justice Scalia himself cautioned against judges relying on substantive canons or what he called “presumptions and rules of construction that load the dice for or against a particular result.”⁴⁷ Ironically, the major questions doctrine, developed in part by Justice Scalia, is just the kind of substantive or “dice-loading” canon he warned about.⁴⁸ The doctrine forces

45. Abbe R. Gluck & Lisa Schultz Bressman, *Statutory Interpretation from the Inside—An Empirical Study of Congressional Drafting, Delegation, and the Canons: Part I*, 65 STAN. L. REV. 901, 1005-06 (2013) (arguing that “[j]urisdictional questions often overlap with or are indistinguishable from ‘major questions’”); see also *Brown & Williamson Tobacco Corp.*, 529 U.S. at 126 (relying in part on the major questions doctrine to hold that “Congress has clearly precluded the FDA from asserting jurisdiction to regulate tobacco products”) (emphasis added).

46. Frank H. Easterbrook, *The Absence of Method in Statutory Interpretation*, 83 U. CHI. L. REV. 81, 83 (2017) (“I am skeptical of canons [E]very canon implicitly begins or ends with the statement ‘unless the context indicates otherwise,’ which potentially leaves so much room for maneuver that the canon isn’t doing much work.”).

47. ANTONIN SCALIA, *A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW* 28 (1997).

48. Cf. Amy Coney Barrett, *Substantive Canons and Faithful Agency*, 90 B.U. L. REV. 109, 110 (2010) (“A court applying a canon to strain statutory text uses something other than the legislative will as its interpretive lodestar, and in so doing, it acts as something other than a faithful agent. The

judges to presume that Congress could not have intended an agency to take a certain regulatory path. Though it is impossible to know based on what the Court has announced to date, this presumption could apply no matter how broad the text of a delegation and notwithstanding any legislative context or evidence that Congress intended to give an agency broad regulatory authority.

Even a textualist might acknowledge that, where textualism alone cannot answer a given interpretive question, an agency lawyer who is expert in the underlying authorizing statute is more likely to possess the necessary tools for comprehensive statutory interpretation than is a generalist judge wielding a “dice-loading” canon that deems agency interpretations of major questions presumptively invalid without relying on more comprehensive tools of statutory interpretation.⁴⁹ Rather than a “dice-loading” canon, *Chevron* is better understood as a deference doctrine that allows agencies and courts to rely on a multitude of interpretive tools—text, purpose, textual canons, and substantive canons. As Justice Stevens, writing for the Court, put it, under *Chevron*, a Court must still “employ[] traditional tools of statutory construction” in order to “ascertain[]” whether “Congress had an intention on the precise question at issue.”⁵⁰ The major questions doctrine is different. Under it, when courts determine that the agency is answering a major question without an explicit delegation, the agency interpretation is presumptively invalid and other interpretive tools are ignored. When judges choose this latter path and ignore more comprehensive and deliberative statutory interpretation, the major questions doctrine has both negative *ex post* and *ex ante* effects. While undertheorized in the existing literature, the negative *ex ante* effects raise troubling separation of powers concerns and will be the focus of Parts II and III.

II. Clean Power Plan

This Part outlines the process for the CPP rulemaking and the rescission and describes the interaction between the White House, EPA policymakers, and lawyers in the development of the CPP. In particular, I explain how regulated parties effectively utilized the major questions doctrine to move EPA lawyers away from their proregulatory statutory interpretation, even though it was based on strong textual and purposive arguments. Instead, relying on the major questions doctrine, regulated parties pushed EPA lawyers toward a narrower statutory interpretation and a less progressive regulation as a way to limit litigation risk, even if the textual justifications for the latter approach were thin at best. In doing so, perhaps against their wishes but at the urging of regulated parties, EPA GC paradoxically employed a statutory interpretation that was

application of substantive canons, therefore, is at apparent odds with the central premise from which textualism proceeds.”).

49. See *infra* Section II.F.

50. *Chevron*, 467 U.S. at 843, 866 n.9.

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contrary to the CAA's broadly acknowledged purpose and no more consistent with its text than those lawyers' previous interpretation. This shift is in contrast to a vision of agency lawyers as purposive statutory interpreters—a shift that may even trouble committed textualists in limited circumstances like the one described in this case study.

This Part proceeds as follows: first, I describe President Obama's direction to the EPA to regulate emissions from new and existing power plants. Second, I discuss the agency's proposed rule and conclude that the EPA GC's textual and purposive justifications under *Chevron* were well-founded. Third, I document how regulated parties' comments that raised major-questions-doctrine concerns resulted in a narrower statutory interpretation that was not a better reading of the statute's text or purpose, but that ultimately led to less regulatory ambition. Fourth, I discuss the focus on the major questions doctrine in the litigation that followed the rulemaking and the lack of uniformity in the manner in which the judges approached the supposedly objective question of whether the rule was of economic or political significance. Fifth, I show that, unlike during the rulemaking, agency lawyers did not rely on the major questions doctrine to moderate the scope of the rescission, which illustrates objectivity and neutrality concerns with the doctrine. And finally, I examine all of the recent major-questions-doctrine cases before district and circuit courts to explain how the CPP rulemaking is largely representative of those cases, even if it is difficult to fully disentangle the effects of the major questions doctrine from the effects of broader litigation risks.

A. Direction to EPA and Statutory Background

On June 25, 2013, President Obama issued a Presidential Memorandum directing the EPA to issue carbon dioxide regulations for existing-source power plants under the CAA.⁵¹ The section of the CAA (section 111(d)) under which President Obama directed EPA to regulate provides that the Administrator shall “prescribe regulations which shall establish a procedure . . . under which each State shall submit to the Administrator a plan which . . . establishes standards of performance.”⁵² The term “standard of performance,” which subsequently became the subject of a critical statutory interpretation question, is defined as:

a standard for emissions of air pollutants which reflects the degree of emission limitation achievable through the application of the *best system of emission reduction* which (taking into account the cost of achieving such reduction and

51. Presidential Memorandum on Power Sector Carbon Pollution Standards, DAILY COMP. PRES. DOC. (June 25, 2013), <https://www.govinfo.gov/content/pkg/DCPD-201300457/pdf/DCPD-201300457.pdf> [<https://perma.cc/7G6J-UBEY>] (directing EPA to regulate under sections 111(b) and 111(d) of the CAA).

52. 42 U.S.C. § 7411(d)(1) (2018).

any nonair quality health and environmental impact and energy requirements) the Administrator determines has been *adequately demonstrated*.⁵³

After issuing “emission guidelines” to identify the “best system of emissions reduction” (BSER),⁵⁴ EPA calculates the emission limitation achievable using the BSER. States are permitted to either apply standards of performance to their regulated sources that achieve an equivalent or better emission limitation or EPA will apply a federal plan to that state.⁵⁵ As a result, states need not adopt specific emission-reduction techniques in the BSER, but they typically must achieve emissions reductions in line with the BSER unless a specific source qualifies for an adjusted regulatory treatment based on its remaining useful life or other factors.

B. Agency Proposed Rule and the EPA GC’s Legal Analysis

While there were several legal issues at stake surrounding the CPP, the most notable relates to how EPA defined the BSER. Based in part on broad interpretations of the BSER in case law,⁵⁶ EPA released a proposed rule that calculated the BSER based on four “building blocks”:

1. Relying on heat rate improvements at coal-fired electric generating units (EGUs).
2. Shifting generation at coal-fired EGUs to underutilized (lower emitting) gas-fired power plants.
3. Shifting generation from fossil fuel fired power plants to zero-emitting generation sources.
4. Using demand-side energy efficiency that reduces the amount of generation required.⁵⁷

As noted, the BSER and the associated building blocks did not direct states or power companies to take any specific actions, and no state would be required to adopt one of the building blocks. Rather, the building blocks were the tools EPA planned to use to calculate by how much emissions could be reduced from each regulated source. That said, the measures that constituted

53. *Id.* § 7411(a)(1) (emphasis added).

54. 40 C.F.R. § 60.22(b)(5) (2019) (providing that guidelines will “reflect[] the application of the best system of emission reduction (considering the cost of such reduction) that has been adequately demonstrated for designated facilities, and the time within which compliance with emission standards of equivalent stringency can be achieved”).

55. 42 U.S.C. § 7411(a), (c); 40 C.F.R. § 60.24 (2019).

56. *See* *Sierra Club v. Costle*, 657 F.2d 298, 321, 330 (D.C. Cir. 1981) (providing that, in setting the BSER, EPA may consider “cost, energy, and environmental impacts in the broadest sense at the national and regional levels and over time as opposed to simply at the plant level in the immediate present”).

57. Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units, 79 Fed. Reg. 34830, 34836 (proposed June 18, 2014).

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the BSER would still have had a significant effect on the environmental and economic impacts of the rule. All else equal, if more measures were included in the BSER, states would have had to reduce their emissions by a greater amount.

Along with the proposed rule, EPA GC released a memo providing a legal justification for key components of the rule, including a *Chevron* analysis of the BSER and the four building blocks. Much of the BSER argument focused on the legality of building blocks 2, 3, and 4, which dealt with measures that took into consideration aspects of the electricity grid that were “beyond the fenceline” of the source. Specifically, the statutory-interpretation question was whether these so-called “beyond the fenceline” measures could be considered part of a “system of emission reduction.” Only building block 1 focused on reducing pollution solely through physical equipment at the source. Building blocks 2 and 3 focused on emission reductions that power plants could achieve by replacing their generation with cleaner and lower-emitting generation. For example, a power plant reducing emissions under building block 2 or 3 could do so respectively by reducing its generation, or, in a state that choose an emission-rate-based compliance framework, by buying credits that represented increased generation by lower-emitting sources. And a power plant reducing emissions under building block 4 would provide incentives for customers to use less energy, likely through support for energy-efficiency measures, which would similarly allow it to reduce its generation and therefore its emissions.

Using a *Chevron* two-step analysis, and without considering the economic or political significance of the agency’s interpretation, the GC memo argued that building blocks 2, 3, and 4 were lawful interpretations of the term “system of emission reduction”:

because that phrase, in the context in which it is used in section 111 and by its terms, is broad enough to apply to the measures in the building blocks, in light of the integrated nature of the electricity grid. Through the integrated grid, the measures reduce overall demand for, and therefore utilization of, higher emitting, fossil fuel-fired EGUs, which, in turn, reduces CO2 emissions from those EGUs.⁵⁸

Chevron step 1 asks whether Congress has directly addressed the precise question at issue, and the GC memo argued that Congress did so, in favor of the agency’s interpretation. The CAA does not explicitly define the word “system,” so the GC memo relied on the dictionary definition of the word: “a set of things working together as parts of a mechanism or interconnecting

58. OFFICE OF GENERAL COUNSEL, ENVTL. PROT. AGENCY, LEGAL MEMORANDUM FOR PROPOSED CARBON POLLUTION EMISSION GUIDELINES FOR EXISTING ELECTRIC UTILITY GENERATING UNITS 49-50 (Sept. 25, 2014) [hereinafter CPP PROPOSED RULE LEGAL MEMORANDUM], <https://archive.epa.gov/epa/sites/production/files/2014-06/documents/20140602-legal-memorandum.pdf> [<https://perma.cc/AZ5F-DN65>].

network; a complex whole.”⁵⁹ The memo focused on the idea of the interconnectedness and complexity of the electric grid: the exact type of “interconnecting network” to which the dictionary definition referred.⁶⁰ The memo next argued that Congress intended a broad definition of the word “system” because “no other provisions in the definition of ‘standard of performance’ include any other constraints on the type of ‘things’ that may serve as the basis for the standard for emissions.”⁶¹

The memo next proceeded to *Chevron* step 2, which asks whether the agency’s interpretation is a reasonable construction of the statute. And the GC memo argued that if the terms of the statute were ambiguous (which the agency argued was not the case), the agency’s interpretation of the term “system” would still be reasonable. In this step, the GC memo considered both the statutory changes and legislative history of the CAA, in addition to its broad statutory purpose. First, the GC memo pointed out that, between 1977 and 1990, Congress differentiated the statutory text for new sources and existing sources (the latter of which is the subject of the CPP): “best *technological* system of continuous emission reduction”⁶² and “best system of *continuous* emission reduction”⁶³ respectively. This differentiation could suggest that Congress intended for the agency to calculate a BSER for existing, as opposed to new, sources using factors that went beyond a specific source’s *technology*. These permissible factors might then include replacement of existing generation with cleaner and lower emitting generation or reduction in the overall use of energy, as was the case in the proposed rule’s buildings blocks 2, 3, and 4. Moreover, the 1977 House-Senate Conference Committee report stated that for existing sources, the standards of performance were to be based on the best “available means of emission control (not necessarily technological),” implying that considerations outside of technological improvements to the individual sources could be a factor in identifying the BSER.⁶⁴ The GC memo also relied on another section of the CAA, which refers to “the *retrofit application* of the best system of continuous emission reduction,”⁶⁵ a more limited application of BSER than section 111(d)’s. Together, these factors supported the view that EPA’s CPP interpretation was reasonable because “[w]here Congress uses certain language in one part of a

59. *Id.* at 36 (quoting *System*, OXFORD DICTIONARY OF ENGLISH (3d ed. 2010)).

60. *Id.*

61. *Id.* at 51-52.

62. *Id.* at 55 (emphasis added).

63. *Id.* at 56 (emphasis added).

64. H.R. REP. NO. 95-564, at 129 (1977) (Conf. Rep.), reprinted in 3 CONG. RESEARCH SERV., A LEGISLATIVE HISTORY OF THE CLEAN AIR ACT AMENDMENTS OF 1977, at 502, 509 (1978). The House Committee Report included the same statement. H.R. REP. NO. 95-294, at 195 (1977), reprinted in 4 CONG. RESEARCH SERV., LEGISLATIVE HISTORY OF THE CLEAN AIR ACT 2465, 2662.

65. CPP PROPOSED RULE LEGAL MEMORANDUM, *supra* note 58, at 59 (quoting 42 U.S.C. § 7651f(b)(2) (2018)) (emphasis added).

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statute and different language in another, it is generally presumed that Congress acts intentionally.”⁶⁶

Second, the GC memo argued that interpreting the BSER “broadly to include the building blocks is consistent with a primary purpose of the CAA, which is encouraging pollution prevention, including assuring that states fulfill their role in developing pollution prevention measures.”⁶⁷ Further, the GC memo argued that EPA had previously regulated with this broad purpose in mind under section 111(d) when it authorized “states to allow large municipal waste combustors to average their emission rates and trade NOx emission credits.”⁶⁸ The methodology of permitting averaging and trading meant that waste combustors could achieve emissions reductions in more ways than merely making technological changes to the sources of emissions themselves.

There was only limited scholarly analysis of the GC’s *Chevron* arguments for the proposed rule, but that limited analysis supported the GC’s arguments. Professor Jody Freeman, for example, expressed modest confidence in the agency’s *Chevron*-step-1 analysis.⁶⁹ Moreover, she argued that the agency’s *Chevron*-step-2 analysis was even stronger.⁷⁰ Despite Freeman and the GC’s argument, I believe it is unlikely that a reviewing court, particularly the Supreme Court, would have held that Congress spoke precisely on the meaning of the word “system” because Congress did not define the word in the statute or the legislative history. However, I believe that the GC’s argument, and Freeman’s analysis of it, at *Chevron* step 2 is correct. Agency interpretations are afforded broad interpretive deference at *Chevron* step 2,⁷¹ and the agency’s interpretation was reasonable based on the statutory text, legislative history, and the broadly acknowledged purpose of the CAA as legislation passed to delegate broad authority to the EPA to deal with future environmental problems.⁷² Even a committed textualist faithfully following the *Chevron* framework could find reason to support the reasonableness of the agency’s initial interpretation. And, as I discuss in the next section, later criticism of the interpretation focused largely on the major questions doctrine, instead of on statutory text or the traditional canons of interpretation.

66. Nat’l Fed’n of Indep. Bus. v. Sebelius, 567 U.S. 519, 544 (2012).

67. CPP PROPOSED RULE LEGAL MEMORANDUM, *supra* note 58, at 56-57.

68. *Id.* at 69 (internal citations omitted).

69. Jody Freeman, *Why I Worry About UARG*, 39 HARVARD ENVTL. L. REV. 9, 13 (2015) (arguing that the plain meaning of the statute and legislative history supported the agency’s interpretation at step 1).

70. *Id.* (arguing that the “integrated nature of the electricity system” makes the agency’s argument eminently reasonable under step 2).

71. Mark Seidenfeld, *A Syncopated Chevron: Emphasizing Reasoned Decisionmaking in Reviewing Agency Interpretations of Statutes*, 73 TEX. L. REV. 83, 100 (“At step two, courts almost never overturn agency interpretations as unreasonable.”).

72. *Massachusetts v. EPA*, 549 U.S. 497, 532 (2007) (stating that, in drafting the CAA, Congress understood that, “without regulatory flexibility, changing circumstances and scientific developments would soon render the Clean Air Act obsolete”).

B. Major Questions Doctrine in Comments, the Final Rule, and the EPA GC's Legal Analysis

Despite Freeman's belief that the agency's interpretation would survive under a *Chevron* analysis, she expressed concern that, in the wake of *UARG* (which was announced five days after EPA issued its CPP proposed rule), the Supreme Court would invoke the major questions doctrine to evaluate the agency's interpretation.⁷³ While we will never know how courts would have ruled on this interpretation, Freeman accurately predicted industry's response to the interpretation. The GC memo did not invoke the major questions doctrine. But after the notice-and-comment period, particularly after receiving comments from regulated parties, the major questions doctrine had a major impact on the EPA GC, and it was ultimately among the central issues litigated.

The Utility Air Regulatory Group (UARG), an ad hoc, unincorporated association of electric generating companies that is now defunct, submitted a comment to EPA on December 1, 2014.⁷⁴ That comment—and its arguments, which were cited in subsequent comments—would significantly impact the GC's response in the final rule and the litigation that followed. Notably, rather than lead with textual arguments, UARG's comment focused on its own view of the purpose of the CAA and its predicted effects of the regulation. The comment's introduction concluded: "EPA has chosen an obscure and little used provision of the CAA as the basis for an unprecedented regulatory program that will undeniably alter the nation's economy."⁷⁵ Commenting in particular on building blocks 2, 3, and 4, UARG argued that:

This "beyond-the-source" approach would allow EPA to restructure every aspect of the states' electric power markets and regulate any electricity user—effectively, to administer the entire national economy—for the purposes of reducing demand for and generation by sources in the listed source category (i.e., existing fossil fuel-fired EGUs).⁷⁶

After invoking the major questions doctrine, UARG argued that the EPA should withdraw building blocks 2, 3, and 4, and did not proceed to a *Chevron* analysis. Instead, UARG spent the bulk of its comment arguing that the major questions doctrine should preclude any kind of deference.

73. Freeman, *supra* note 69, at 16-17 (citing the facts that section 111(d) is "little-used," both costs and benefits are high, and Congress failed to enact cap and trade legislation as reasons the Court might consider the CPP to trigger the major questions doctrine).

74. UARG was also the named petitioner in *Utility Air Regulatory Group v. EPA (UARG)*, 573 U.S. 302 (2014), the case discussed above and cited throughout this Note.

75. Utility Air Regulatory Group, Comments on Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units (Dec. 1, 2014), <https://www.regulations.gov/contentStreamer?documentId=EPA-HQ-OAR-2013-0602-22768&attachmentNumber=1&contentType=pdf> [<https://perma.cc/B6CE-SN4K>].

76. *Id.* at 31.

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After regulated parties voiced these concerns, the agency made significant changes to the rule, and the GC made significant changes to the legal analysis. Here, I focus on two that are most related to the major questions doctrine: the elimination of building block 4 (demand-side consumer energy efficiency) from the BSER and a set of arguments addressing why the major questions doctrine should not preclude *Chevron* analysis for building blocks 2 and 3 (shifting generation to lower-emitting fossil fuels and to renewable energy, respectively).

In eliminating building block 4 from the BSER, the agency determined that, “because the affected EGUs must be able to achieve their emission performance rates through the application of the BSER, the BSER must be controls or measures that the EGUs themselves can implement.”⁷⁷ In other words, they must be measures that “owners or operators” of sources can implement themselves.⁷⁸ This new interpretation directly contrasted with EPA’s broader interpretation in the proposed rule that the BSER could reflect measures throughout the entire electric grid even if those measures entailed reduced overall production.⁷⁹ Moreover, the agency did not attempt to argue that its new interpretation aligned more with the statute’s purpose or text. Instead, the analysis focused on past practice:

[O]ur traditional interpretation and implementation of CAA section 111 has allowed regulated entities to produce as much of a particular good as they desire provided that they do so through an appropriately clean (or low-emitting) process. While building blocks 1, 2, and 3 fall squarely within this paradigm, the proposed building block 4 does not.⁸⁰

This argument is a major reversal from the proposed rule and the GC’s view that building block 4 was a reasonable interpretation of the statute. As discussed above, there, the agency argued that building block 4 should survive judicial review under either *Chevron* step 1 or *Chevron* step 2. Yet, after regulated parties attacked the lawfulness of building blocks 2, 3, and 4 under the major questions doctrine, EPA reversed its position and removed building block 4—without stating conclusively whether it determined that building block 4 was an unreasonable interpretation of the statute.

Moreover, the agency publicly acknowledged that this step was taken to reduce litigation risk. Specifically, the agency acknowledged that it did not accept as true the argument that building block 4 would fundamentally transform the economy. Rather, the change had “the benefit of allaying legal and other concerns raised by commenters [UARG], including concerns that

77. Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units, 80 Fed. Reg. 64662, 64776 (Oct. 23, 2015).

78. *Id.* at 64720.

79. CPP PROPOSED RULE LEGAL MEMORANDUM, *supra* note 58, at 36.

80. 80 Fed. Reg. at 64738.

individuals could be ‘swept into’ the regulatory process by imposing requirements on ‘every household in the land.’”⁸¹ And despite the reversal, states were still permitted to use demand-side energy efficiency to meet their targets.⁸² Basing an interpretive change not on statutory text, or even purpose, but instead entirely on litigation risk related to a highly subjective interpretive canon that is disconnected from the statute’s text and purpose should be of concern to purposivists and textualists alike.

In addition to the reversal on building block 4, the final rule GC memo vigorously defended building blocks 2 and 3 against parallels to *UARG* and *Brown & Williamson* for two main reasons. First, “in both cases, the agencies’ interpretation of one part of the relevant statute created a direct conflict with another part of the statute.”⁸³ However, here, “the agency’s interpretation does not create conflicts with other provisions of the Clean Air Act that would render the statute internally inconsistent or ‘unrecognizable to the Congress that enacted it.’”⁸⁴ Second, “the BSER, as well as the scope of available compliance options the agency is recognizing in the final rule, is fully consistent with current trends in the industry.”⁸⁵ As a result, building blocks 2 and 3 would not have had the significant and transformative effect on the economy or the electricity sector that industry argued, according to the EPA GC. Paradoxically, EPA GC did not clarify why both of these arguments did not apply to building block 4.

C. Discussion of the Major Questions Doctrine at Oral Argument

Shortly after the final rule was published in the Federal Register, a coalition of regulated parties and states filed suit against the agency.⁸⁶ The petitioners alleged that building blocks 2 and 3 were an impermissible interpretation of the statute⁸⁷ and that *Chevron* deference did not apply “once the *UARG* clear statement rule is triggered.”⁸⁸ The government (the Department of Justice’s Environmental Defense Section with the EPA GC as of counsel) countered with the argument that the GC put forward in the proposed

81. *Id.* at 64779 (quoting *Util. Air Regulatory Grp. v. EPA (UARG)*, 573 U.S. at 310 (2014)).

82. *Id.* at 64674.

83. OFFICE OF GENERAL COUNSEL, ENVTL. PROT. AGENCY, LEGAL MEMORANDUM FOR FINAL CARBON POLLUTION EMISSION GUIDELINES FOR EXISTING ELECTRIC UTILITY GENERATING UNITS 133 (OCT. 23, 2015), <https://www.epa.gov/sites/production/files/2015-11/documents/cpp-legal-memo.pdf> [<https://perma.cc/5BA2-56TM>].

84. *Id.* at 134.

85. *Id.* at 135.

86. A D.C. Circuit panel consisting of Judges Henderson, Rogers, and Srinivasan denied the States’ motion for a stay. Order, *West Virginia v. EPA (In re Murray Energy Corp.)*, 788 F.3d 330 (D.C. Cir. Jan. 21, 2016). But Justice Roberts writing for the Supreme Court, with Justices Breyer, Ginsburg, Kagan, and Sotomayor dissenting, stayed the rule pending review on the merits by the D.C. Circuit. Grant of Application for Stay, *West Virginia v. EPA*, 136 S. Ct. 1000 (2016).

87. Motion for Stay at 17, *In re Murray Energy Corp.*, 788 F.3d 330 (D.C. Cir. 2015).

88. Motion in Opposition to Stay at 3, *In re Murray Energy Corp.*, 788 F.3d 330 (D.C. Cir. 2015).

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rule legal memo: that EPA had the correct interpretation of the statute under *Chevron* step 1 and that, even if it did not, the interpretation should be upheld as reasonable under *Chevron* step 2.⁸⁹ The government argued that the *Chevron* standard was “clearly applicable to the Agency’s interpretations of the Act, and EPA is well-qualified to fill the gap left open by any ambiguity in the CAA.”⁹⁰ And the government also relied on its decision to withdraw building block 4 from the BSER as further evidence of the reasonableness of its interpretation.⁹¹

Once the case proceeded to oral argument before the en banc D.C. Circuit, much of the questioning focused on whether the rule triggered the major questions doctrine. In an exchange with Judge Tatel, Elbert Lin, Solicitor General of West Virginia, conceded that the States’ main argument was that the case should not proceed to a traditional *Chevron* analysis.⁹² It is impossible to know whether the States employed a major questions doctrine analysis because they believed they had an untenable case under a purposive or textual approach to *Chevron*, but that is at least one possibility.

In oral argument, the judges appeared divided on whether the CPP triggered the major questions doctrine. Judge Griffith’s exchange with Solicitor General Lin is just one example:

JUDGE GRIFFITH: [T]his doesn’t sound like *UARG* It doesn’t sound like *Brown & Williamson* [I]n *UARG* you had millions of new sources that were to be regulated, *Brown & Williamson* you had a whole new industry, and now you’re talking about a marginal difference, some experts say a five percent difference, your experts say 10 percent difference, by 2030, that doesn’t seem to me to be transformative.⁹³

Judge Tatel suggested that *Chevron* was the proper framework because the CPP would not have been “unrecognizable” to the Congress that passed the CAA,⁹⁴ another key characteristic identified by the Supreme Court in triggering the major questions doctrine.⁹⁵

On the other hand, then-Judge Kavanaugh expressed the importance of the major questions doctrine to the separation of powers,⁹⁶ and his view that the

89. *Id.* at 26.

90. *Id.*

91. *Id.* at 24 (arguing that one cabining force on the statute is a prohibition against “considering only those systems that do not require any reduction in aggregate production levels within an industry, which precludes consideration of, e.g., demand-side efficiency measures.”).

92. Oral Argument at 9-10, *In re Murray Energy Corp.*, 788 F.3d 330 (D.C. Cir. Sept. 27, 2016).

93. *Id.* at 5-6.

94. *Id.* at 6-7.

95. *See UARG*, 573 U.S. at 324 (observing that the Court was “confront[ing] a singular situation: an agency laying claim to extravagant statutory power over the national economy while at the same time strenuously asserting that the authority claimed would render the statute *unrecognizable to the Congress that designed it.*”) (emphasis added)).

96. Oral Argument at 42, *In re Murray Energy Corp.*, 788 F.3d 330.

CPP triggered the doctrine and was therefore not entitled to *Chevron*. He called the CPP a “huge case . . . it’s got huge . . . economic and political significance, Congress is focused on it, the President announces it in the East Room, it has huge international repercussions.”⁹⁷ He continued:

JUDGE KAVANAUGH: EPA when it has to single-mindedly focus on the emissions reductions, but there are people, lots of people, you know, lose their jobs, lose their livelihoods, whole communities are going to be left behind, parts of whole states are going to be left behind, and that’s why for a big question like this Congress can do things like job training programs . . . [T]hat’s why the separation of powers principle matters, because Congress can look at something like this in a well-rounded approach.⁹⁸

The focus on the major questions doctrine in oral argument and the varying manners in which the judges approached the issue likely justified the anxiety that EPA lawyers felt in narrowing the scope of the final rule compared to the proposed rule, even if doing so had little textual or purposive basis. Judges were divided on what constituted a major question, and some of the judges’ arguments combined anti-regulatory *policy* arguments against the CPP with the major questions doctrine. For example, one could argue that, even in the context of the separation of powers comment that then-Judge Kavanaugh made, questions related to predicted job loss and decreased community livelihood are closer to the policy questions that actors within the political branches ought to ask than they are to the legal questions that judges ought to ask. Against this backdrop, and regardless of the substantive policy area at issue, it is likely quite difficult for risk-averse and court-centered agency lawyers to take any path other than encouraging their policymaking clients to be as modest in regulatory scope as possible—even if that kind of advice is contrary to statutory text, Congress’s likely purpose, and a vision of agency lawyers as having unique institutional strengths as purposive statutory interpreters.

D. CPP Repeal

After President Trump’s election, the D.C. Circuit held the CPP litigation in abeyance (it had not yet issued an opinion following oral argument), and on March 28, 2017, President Trump issued an executive order directing the EPA to “take all steps necessary to review the final rules” of the CPP and “suspend, revise, or rescind the guidance.”⁹⁹ On October 16, 2017, EPA published in the Federal Register a proposal to repeal the CPP and seek comment and potential replacements for it.¹⁰⁰ While the CPP proposed rule and proposed rule legal

97. *Id.* at 44-45.

98. *Id.* at 63.

99. Exec. Order No. 13,783, 82 Fed. Reg. 16093 (Mar. 28, 2017).

100. Repeal of Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units, 82 Fed. Reg. 48035 (proposed Oct. 16, 2017).

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memorandum were a combined 235 pages (130 and 105 respectively), the proposed repeal was 15 pages without an accompanying legal memorandum. Critically, the agency changed its interpretation of the BSER, stating that it was:

limited to emission reduction measures that can be *applied to or at* an individual stationary source. That is, such measures must be based on a physical or operational change to a building, structure, facility, or installation at that source, rather than measures that the source's owner or operator *can implement on behalf of* the source at another location.¹⁰¹

This interpretation was far narrower than the proposed rule's definition ("a set of things working together as parts of a mechanism or interconnecting network"¹⁰²) and the final rule's definition (measures that "owners or operators" of sources can implement themselves).¹⁰³ Under the new proposed definition, the Trump EPA position was that only building block 1 would have been legally permissible because any change other than a "physical or operational change to a building, structure, facility, or installation at that source" was not a proper interpretation of the word "system" and therefore could not be included in the BSER calculation.

As with the change between the Obama proposed and final rules, it is difficult to see this recent shift as justified on either textual or purposive terms. Though the agency did of course discuss the relevant statutory provision¹⁰⁴ and nearby provisions under a whole-act rule-type analysis,¹⁰⁵ it is difficult to read that section of the proposed rule as dispositive, given the text's ambiguity. However, the agency's later discussion of the major questions doctrine and its view that the new interpretation "is more consistent with certain broader policy concerns of the Agency and stakeholders"¹⁰⁶ may have carried more interpretive weight. Moreover, EPA argued that this proposed interpretation was subject to *Chevron* deference rather than the major questions doctrine it now argued applied to the original rulemaking. EPA attempted to justify these differing levels of review by arguing that agencies have broad authority to revisit prior statutory interpretations.¹⁰⁷ EPA also based this argument on the fact that the repeal, unlike the original rulemaking, would not have "serious

101. *Id.* at 48039.

102. CPP PROPOSED RULE LEGAL MEMORANDUM, *supra* note 58, at 36.

103. Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units, 80 Fed. Reg. 64662, 64720 (Oct. 23, 2015).

104. Repeal of Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units, 82 Fed. Reg. 48039 (Oct. 16, 2017).

105. *Id.*

106. *Id.* at 48042.

107. *Id.* at 48039 (citing *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 981 (2005)).

economic and political consequences.”¹⁰⁸ This argument seems to evaluate whether a deregulatory action would have “serious economic and political consequences” by comparing the action to the world before the original regulatory action took place—that is, deregulating has no significant economic and political consequences compared to a world without the regulation in the first place. But the EPA rarely, if ever, deregulates in this kind of regulation-free world. Rather, EPA deregulates in a status quo with significant regulations already in place. Eliminating the CPP compared to a status quo with the CPP would have “serious economic and political consequences” by practically any measure. A more objective major questions doctrine—one that scrutinizes an agencies’ deregulatory interpretations as closely as their proregulatory ones—would take account of this reality, while the current doctrine does not. But given the landscape of recent major questions doctrine cases before the district and circuit courts,¹⁰⁹ EPA lawyers likely concluded that this kind of judicial review was extremely unlikely.

EPA proposed a replacement, known as the Affordable Clean Energy (ACE) rule, on August 31, 2018.¹¹⁰ The associated final rule was published in the Federal Register on July 8, 2019.¹¹¹ That rule relies on the proposed repeal’s interpretation of the BSER and is therefore focused only on “[heat reduction improvement] measures that can be applied at an affected source”¹¹²—the functional equivalent of building block 1 only. In addition, environmental advocates have widely criticized the proposal because it gives states wide latitude not just in how they meet their targets (as was the case in the CPP) but also in *whether* they choose to meet their targets at all.¹¹³

E. Representativeness of the CPP Rulemaking

Before turning to the broader implications of the invocation of the major questions doctrine in the CPP rulemaking, it is necessary to understand how representative the CPP is of other rulemakings and litigation involving the major questions doctrine. In particular, one might argue that the CPP is unrepresentative for two reasons that I address here: first, because the major

108. *Id.* at 48042 (seeking comment on whether the agency, by “substantially diminishing the potential economic and political consequences of any future regulation” no longer implicates the major questions doctrine).

109. *See infra* Section II.F.

110. Emission Guidelines for Greenhouse Gas Emissions from Existing Electric Utility Generating Units; Revisions to Emission Guideline Implementing Regulations; Revisions to New Source Review Program, 83 Fed. Reg. 44746 (Aug. 31, 2018).

111. Repeal of the Clean Power Plan; Emission Guidelines for Greenhouse Gas Emissions From Existing Electric Utility Generating Units; Revisions to Emission Guidelines Implementing Regulations, 84 Fed. Reg. 32520 (Jul. 8, 2019).

112. 83 Fed. Reg. at 44748.

113. *See, e.g.*, Julie McNamara, *Trump Administration’s “Affordable Clean Energy” Rule Is Anything But*, UNION CONCERNED SCIENTISTS BLOG (Aug. 31, 2018, 10:34 AM), <https://blog.ucsusa.org/julie-mcnamara/ace-dangerous-clean-power-plan-replacement> [<https://perma.cc/HR9D-RN6A>].

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questions doctrine may apply with equal force to cases when an agency is interpreting a statute more broadly or more narrowly than a previous interpretation; and second, because it is difficult to disaggregate the role of the major questions doctrine from other legal concerns that are raised in a particular rulemaking.

First, a review of circuit and district court cases since *UARG* that cited the major questions doctrine, as stated in *UARG*, suggests that the courts of appeals and district courts rely on the major questions doctrine as a tool to check broad statutory interpretations or relative expansions of agency authority, as agency lawyers suspected they would in the CPP rulemaking. However, these courts do not appear to be invoking the doctrine in cases where an agency narrows its interpretation or attempts to contract its authority, even though agencies have done so frequently in the first years of the Trump Administration.¹¹⁴ In particular, the *UARG* language has been cited in nine separate circuit and district court cases since 2014: once by the Fourth Circuit,¹¹⁵ three times by the Fifth Circuit,¹¹⁶ once by the Seventh Circuit,¹¹⁷ twice by the D.C. Circuit,¹¹⁸ and once respectively by district courts in the Fifth and Tenth Circuits.¹¹⁹

Of those nine cases, none involved a challenge to a statutory interpretation for being too narrow; all involved a challenge to a statutory interpretation that was allegedly overbroad. Courts struck down statutory interpretations made during the Obama Administration in part on major questions doctrine grounds four times: the Department of Labor's fiduciary rule in *Chamber of Commerce v. United States*, the Department of Homeland Security's Deferred Action for Parents of Americans (DAPA) program in *Texas v. United States*, the Bureau of Land Management's hydraulic fracturing rule in *Wyoming v. DOI*, and the Department of Labor's overtime rule in *Nevada v. United States*. Moreover, of the four times that courts have cited the doctrine in cases dealing with statutory interpretations during the Trump Administration, two cases similarly involved a court determining that an agency had exceeded its statutory authority with its new interpretation. In *City of Chicago v. Sessions*, the Seventh Circuit cited *UARG* in holding that the Attorney General's interpretation of an ambiguous statute as providing him with the authority to condition certain law

114. See *supra* Section II.E (discussing the repeal of the CPP, which relied on a narrower statutory interpretation than the agency's previous one).

115. *Int'l Refugee Assistance Project v. Trump*, 883 F.3d 233, 297 (4th Cir. 2018) (Gregory, J., concurring).

116. *Acosta v. Hensel Phelps Constr. Co.*, 909 F.3d 723, 736-37 (5th Cir. 2018); *Chamber of Commerce of the U.S. v. U.S. Dep't of Labor*, 885 F.3d 360, 380-81, 387 (5th Cir. 2018); *Texas v. United States*, 809 F.3d 134, 181 (5th Cir. 2015).

117. *City of Chicago v. Sessions*, 888 F.3d 272, 287 (7th Cir. 2018).

118. *Guedes v. Bureau of Alcohol, Tobacco, Firearms and Explosives*, 920 F.3d 1, 41-42 (D.C. Cir. 2019) (Henderson, J., dissenting); *U.S. Telecomm. Ass'n v. FCC*, 855 F.3d 381, 403 (D.C. Cir. 2017) (Brown, J., dissenting).

119. *Nevada v. U.S. Dep't of Labor*, 218 F. Supp. 3d 520, 530 n.5 (E.D. Tex. 2016); *Wyoming v. U.S. Dep't of the Interior*, No. 2:15-CV-043-SWS, 2016 U.S. Dist. LEXIS 82132, at *23 (D. Wyo. June 21, 2016).

enforcement grants on a city not adopting “sanctuary city” policies was impermissible.¹²⁰ And in a concurring opinion in *International Refugee Assistance Project v. Trump*, Fourth Circuit Judge Roger Gregory cited *UARG* in arguing that President Trump’s interpretation of the Immigration and Nationality Act’s (INA) provisions regarding the inadmissibility of certain aliens as the statutory basis for a ban on most non-American Muslims entering the United States was impermissible.¹²¹ The other two cases that dealt with an agency interpretation during the Trump Administration involved a citation of *UARG* in a dissent¹²² and as a point of comparison, explaining why a broad interpretation was permissible.¹²³ Because major-questions-doctrine cases since *UARG* have only involved litigants challenging new agency statutory interpretations as giving the interpreting agency too much authority—and none have involved litigants challenging an agency for deregulating in a manner that is inconsistent with statutory text or purpose—the CPP rulemaking and litigation is broadly representative of recent major-questions-doctrine cases.

U.S. Telecommunications Ass’n v. FCC, the ninth case citing the major questions doctrine as it is stated in *UARG*, dealt with whether the Obama-era statutory interpretation underlying the net-neutrality rule was a permissible interpretation. Commenting on Judge Brown and then-Judge Kavanaugh’s dissents to the denial of a rehearing en banc, Judge Srinivasan, with Judge Tatel joining, alluded to some of the criticisms of the doctrine discussed in the literature and raised in section III.B, *infra*, by referring to the major questions doctrine not as a controlling doctrine but instead as “a doctrine that [then-Judge Kavanaugh] gleans from certain Supreme Court decisions.”¹²⁴ While this case provides an interesting account of the advantages and disadvantages of the doctrine, as expressed by Judges Srinivasan, Brown, and Kavanaugh, its structure is consistent with the other eight major questions doctrine cases discussed here: a private litigant challenging the agency’s interpretation as too broad. Unlike the four other cases that deal with an Obama-era statutory interpretation, however, the D.C. Circuit here upheld the agency’s interpretation under *Chevron*.

The second potential representativeness concern with the CPP—that it is hard to know whether the CPP case study is representative of major questions doctrine cases because it is hard to disaggregate the effects of the major questions doctrine from other litigation risks—carries more weight. Based on the available documents discussed in Part II, *supra*, it seems plausible that EPA GC engaged in a strategic evolution to protect itself against legal risks associated with the major questions doctrine, rather than a doctrinal evolution

120. *Chicago v. Sessions*, 888 F.3d at 287.

121. *Int’l Refugee Assistance Project v. Trump*, 883 F.3d 233, 297 (4th Cir. 2018) (Gregory, J., concurring) (citing *Util. Air Regulatory Grp. v. EPA (UARG)*, 573 U.S. 302, 324 (2014)).

122. *Guedes*, 920 F.3d at 6.

123. *Acosta v. Hensel Phelps Constr. Co.*, 909 F.3d 723, 736-37 (5th Cir. 2018).

124. *U.S. Telecomm. Ass’n v. FCC*, 855 F.3d 381, 383 (D.C. Cir. 2017).

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explained by a textual or purposive analysis. Moreover, the similarity between the CPP rulemaking and the other recent major-questions-doctrine cases (the fact that all involved a challenge to statutory interpretations that were allegedly overbroad), further suggests that the major questions doctrine was a decisive factor in EPA GC's statutory interpretation evolution. While an interpretive evolution based on statutory text or purpose should be seen as broadly beneficial, such an evolution based on a highly subjective interpretive canon that is detached from both text and purpose should raise real concerns among both textualists and purposivists.

That said, it is difficult to know with certainty why exactly various decisions were made without access to private documents or conversations with lawyers and policymakers at EPA, the White House, and the Department of Justice. As a result, painting a clearer picture of the way agency lawyers responded to the major questions doctrine in the CPP context based on documents and interviews that are currently unavailable would be a useful scholarly endeavor. And beyond the CPP, the empirical and qualitative literature on agency statutory interpretation would benefit from a more in-depth analysis of the way agency lawyers and policymakers believe the major questions doctrine impacts their work, beyond Walker's initial empirical analysis of agency statutory interpretation broadly.

III. Implications

It is not possible to know with certainty why the EPA GC adjusted its legal analysis, or the degree of pushback from EPA policy officials, lawyers, or the Department of Justice to the new legal analysis or rescission. That said, several inferences can be made that provide insight into the *ex ante* effect of the major questions doctrine generally, not just in the CPP or environmental context. These inferences are possible even before scholars have access to internal documents or can interview lawyers and policymakers who were part of the rulemaking.

In this Part, I first discuss how the CPP case study is consistent with the literature on presidential-driven regulatory policy and executive branch lawyers, but how it differs from the vision of purposive agency GCs discussed in Part I. Based on the case study, I then identify and discuss four concerns with the *ex ante* impact of the major questions doctrine on agency lawyers—some of which share similarities with critiques of the *ex post* effects of the doctrine in the existing literature. First, rather than serving as an objective and nonideological tool of statutory interpretation, the major questions doctrine, as applied, incentivizes agency lawyers to privilege deregulatory statutory interpretations over proregulatory ones. This privileging has occurred in rulemakings when agency lawyers limit the novelty of a regulation, even if that regulation, as proposed, is within the statute's text and purpose. Privileging has also occurred in rescissions because, to date, agency lawyers have not relied on

the major questions doctrine to check bold deregulatory executive action—even though an objective understanding of the doctrine suggests it could apply with equal force to proregulatory and deregulatory interpretations. The doctrine’s lack of objectivity should trouble committed textualists, as much as it does those in favor of purposive statutory interpretation. Second, the major questions doctrine takes interpretive authority away from agency lawyers because it forces them to spend more time determining what constitutes a major question under a vague standard than working to understand and identify Congress’s intended purpose, a role they are uniquely situated to play within the separation of powers scheme. Critically, this focus on litigation risk occurs even when the litigation risk bears no relation to the statute’s text or purpose, but instead to a highly subjective interpretive canon like the major questions doctrine. Third, the doctrine has provided an easy tool for regulated-party commenters to exploit agency lawyers’ incentives and move regulations in a deregulatory direction by raising any colorable argument that a regulation is of economic or political significance. However, the doctrine has not provided such a tool to those other than regulated parties, including regulatory beneficiaries or those representing broad and diffuse interests. And fourth, the doctrine forces agency lawyers to guess what judges might think constitutes a major question because the Supreme Court has not clearly defined the term and because some judges use the major questions doctrine as a means to express policy, rather than legal, preferences. This definitional ambiguity has an even more corrosive effect on agency deliberative processes and agency lawyers’ roles within the separation of powers scheme than a clearly defined major questions doctrine would.

A. Presidential-Driven Regulatory Policy and Agency Lawyers’ Incentives

Both the direction to EPA to regulate carbon emissions from existing source-power plants and to repeal those regulations were presidential-driven regulations. President Obama committed in his Second Inaugural to “respond to the threat of climate change, knowing that the failure to do so would betray our children and future generations.”¹²⁵ And with much fanfare, he directed the EPA to regulate in a particular area, including with reference to the specific statute under which the agency should regulate.¹²⁶ Theoretically, this dynamic should have encouraged policymakers at EPA to put in place bold regulations that matched the President’s rhetoric. The proposed rule was just that—an interpretation of a provision in the CAA that would have had broad environmental benefits.¹²⁷ Agency lawyers defended the regulation and its

125. Inaugural Address, 1 PUB. PAPERS 46 (Jan. 21, 2013).

126. Presidential Memorandum on Power Sector Carbon Pollution Standards, *supra* note 51.

127. Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units, 79 Fed. Reg. 34830, 34936 (proposed June 18, 2014) (estimating climate benefits and health co-benefits to be “\$33 billion to \$54 billion in 2020 and \$55 billion to \$89 billion in 2030”).

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interpretation of the CAA as lawful under *Chevron*, relying on both textual and purposive arguments. As I argued above, their *Chevron* analysis was persuasive. Further, President Trump's announcement of the CPP rescission, flanked by coal miners and coal executives, should have had a similar effect on the executive branch.

Due in large part to the major questions doctrine, however, the lawyers working with policymakers in both administrations faced very different incentives. And as a result, they had a vastly different impact on the administrations' respective regulatory decisions. Despite the energized president and EPA policymakers, and the agency's persuasive *Chevron* analysis, the major questions doctrine empowered regulated parties to have a major impact on the EPA GC's office. UARG sought to limit compliance costs imposed on regulated parties, which EPA projected could be \$5.5 to \$7.5 billion annually in 2020,¹²⁸ so its comment invoked the major questions doctrine. And UARG had a much stronger case under this standard than under *Chevron*.¹²⁹

Faced with this dilemma, the EPA GC's advice and policy officials' likely reception to it was predictable, based on the executive-branch-lawyering literature: agency lawyers cautiously and appropriately advised their policymaking clients of legal risks, and policymakers heeded their advice.¹³⁰ However, the EPA GC did not ultimately play a purposive role in statutory interpretation. In an attempt to minimize litigation risk in a court-centered manner, the EPA GC adjusted its legal analysis. There was little reason its new interpretation of the CAA was more or less correct from the perspective of trying to reach the best interpretation of the statute. In fact, the EPA GC offered persuasive textual and purposive arguments in the proposal, and it did not address those arguments in the final rule, nor did it base its revised analysis on anything in the text or legislative history of the CAA. Rather, the EPA GC focused more on the novelty of its interpretation in the proposed rule and did not even fully accept industry's criticism as true. It instead argued that narrowing its interpretation had the benefit of "allaying legal and other concerns raised by commenters," that is, minimizing litigation risk related to the major questions doctrine.¹³¹ It is easy to imagine the major questions doctrine having this kind of effect in rulemakings spanning a vast range of policy areas—even when, as here, textual and purposive analyses support a broader reading of a statute.

128. *Id.* at 34934.

129. While the Supreme Court has not elaborated a standard that should be used in place of *Chevron* when the major questions doctrine is triggered, triggering of the doctrine has been fatal and the regulation has been held unlawful in all cases.

130. Pillard, *supra* note 34, at 730 (arguing that government lawyers aim to "reduce risks of damaging losses" in court); *see also* Pillard, *supra* note 34, at 685 (arguing that government lawyers "speak[] with a level of authority that [their] clients overwhelmingly respect").

131. Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units, 80 Fed. Reg. 64662, 64779 (Oct. 23, 2015).

B. Major Ex Ante Concerns with the Major Questions Doctrine

Compared to the CPP rulemaking process, the CPP repeal shows that EPA lawyers believed that the major questions doctrine had no *ex ante* limiting effect on deregulatory agendas. And the fact that circuit and district courts have cited the major questions doctrine in nine recent cases, all of which involve a statutory interpretation that is allegedly overbroad, supports these lawyers' views—even if a more objective major questions doctrine would have closely scrutinized a deregulatory statutory interpretation, like the CPP repeal.¹³² This disconnect is the first significant *ex ante* concern with the major questions doctrine: its lack of objectivity, which creates an incentive for agency lawyers to scrutinize proregulatory decisions skeptically while largely glossing over deregulatory decisions. During deregulatory rulemakings, agencies usually can rely on deferential judicial review under *Chevron*. They need not muster the same effort to persuade courts; unlike the 235 pages of detailed policy and legal analysis for the proposed rulemaking, the repeal documents were a mere 15 pages. In other words, while the major questions doctrine allowed regulated parties to persuade risk-averse agency lawyers to have an *ex ante* limiting effect on a proregulatory rule, agency lawyers believed they had no analogous tool to limit a deregulatory action. As Heinzerling concluded in discussing the *ex post* effects of the doctrine, “[t]o make interpretive deference turn on the regulatory or deregulatory, or contractive or expansive, thrust of an agency’s choice is not a neutral choice.”¹³³ The same can be said of the doctrine’s *ex ante* effects—a deeply problematic outcome, regardless of the rulemaking’s substantive policy area and regardless of one’s view on the administrative state or statutory interpretation.

The second concern that the CPP case study raises is that the major questions doctrine diminishes the important role of agency lawyers in the separation of powers scheme by equipping regulated parties with a tool to limit agency lawyers’ interpretive and legal power in order to reach the regulated parties’ desired policy outcome. As discussed, one might expect agency GCs—as opposed to OLC—to play a more purposive role in statutory interpretation than their OLC counterparts. And this role for agency GCs could be broadly productive in helping agencies reach the best interpretation of the law, given OLC’s likely differing perspective. But because of the major questions doctrine, the EPA GC’s ability to play this role was significantly diminished. Instead of focusing on the CAA’s purpose, lawyers focused on limiting litigation risk related to the major questions doctrine, given the likelihood that the interpretation would be reviewed under the “dice-loading” doctrine.

This outcome is not textualist; it is merely another kind of purposivism that typically favors regulated parties over other parties. As in *UARG*, the

132. By “objective,” I refer to a doctrine that scrutinizes regulatory and deregulatory agency action with equal force.

133. Heinzerling, *supra* note 7, at 1986-87.

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agency in the CPP rulemaking was arguably regulating based on what Heinzerling argued was “a congressional desire for the agency to reach new environmental problems without further recourse to the legislative process.”¹³⁴ If, as theorized above, agency lawyers changed their legal views following industry comment out of fear that courts would invoke the major questions doctrine, agency lawyers acted as agents of the courts to usurp interpretative power from the executive branch and the Congress that delegated interpretative authority to the agency. In doing so, agency lawyers also failed to play an important role that they are uniquely situated to play within the separation of powers scheme: purposive statutory interpreters.

Acting to minimize litigation on its own does not present problems; of course lawyers should position their clients to win, rather than lose, in court. But where, as here, agency lawyers are left with little choice but to prioritize adherence to a highly subjective interpretive canon that did not exist when Congress passed the relevant statute, those lawyers cannot focus on a comprehensive understanding of congressional intent—one of their most important roles in the separation of powers scheme.

In fact, the distortion of the major questions doctrine raises separation of powers concerns. Those concerns do not exist when agency lawyers minimize litigation risk by *accurately* determining congressional intent. For example, an agency lawyer actually enhances separation of powers values when she advises her policymaking client to narrow the scope of a rule that she believes exceeds the authority that Congress delegated to the agency. But a focus on litigation risk does raise separation of power concerns when agency lawyers feel they must minimize litigation risk by ignoring or deprioritizing congressional intent, especially when they do so in favor of highly subjective interpretive canons pushed by courts. For an example of this dynamic, one need look no further than the transition from the CPP proposed rule to the CPP final rule.

Professor William Eskridge has argued that canons of statutory interpretation can enhance democratic values when they help judges “understand the policy assumptions, trade-offs, purposes, and deals that characterize the serious process of statute-making in our system.”¹³⁵ The CPP case study shows that the major questions doctrine can do just the opposite, before cases are even litigated. Specifically, as was the case with the CPP, the doctrine skews all statutory-interpretation questions of economic or political significance. Agency lawyers are driven to ignore the explicit or implicit choices and trade-offs Congress made and the purposes with which it acted whenever an economically or politically significant rule is at issue. If regulated parties continue to invoke the doctrine in this way (which is likely given their success to date), agencies may less frequently gain a comprehensive understanding of congressional meaning and purpose.

134. *Id.* at 1990-91.

135. Eskridge, *supra* note 7, at 579.

The third *ex ante* concern with the major questions doctrine is that, while it equips regulated parties with a tool to influence agency lawyers, broad and diffuse interests that scholars have referred to as “regulatory beneficiaries” have no such tool.¹³⁶ Unlike in the original rulemaking, agency lawyers did not have a significant influence on the repeal process because their legal analysis remained consistent with President Trump’s deregulatory vision from the time of the executive order, through the proposed rescission of the CPP, until the finalized ACE rule. In other words, agency lawyers during the CPP repeal did not act consistently with a vision of their role as purposive statutory interpreters. While one could easily argue that failing to combat climate change would impose significant economic costs and is inconsistent with the purpose of the CAA, agency lawyers did not address these arguments. And one explanation for this decision is that, based in part on the nine recent cases in which the district and circuit courts have invoked the major questions doctrine, the EPA GC did not believe courts would have required them to justify a deregulatory interpretation under a major-questions-doctrine analysis that focuses more on the rule’s economic or political significance than on statutory text or purpose.¹³⁷

The significant value of the doctrine for regulated parties but not for regulatory beneficiaries presents problems from both a democratic theory and legal perspective. With respect to democratic theory, Professor Nina Mendelson has described regulatory beneficiaries as those who “gain from government action but lack any focused or direct relationship with the agency.”¹³⁸ Mendelson argues that, under a range of explanations for the democratic legitimacy of the administrative state, the views of regulatory beneficiaries should always factor into agency decisionmaking.¹³⁹ But she notes that “whether regulatory beneficiaries can hold an agency accountable for implementing a particular statutory program will depend on the ability of beneficiaries to invoke external mechanisms of control,” including the “extent to which beneficiaries have access to agency processes.”¹⁴⁰ As the CPP case study demonstrates, the major questions doctrine gives regulated parties a critical interpretive tool that allows those parties “access to agency processes.”

136. Nina A. Mendelson, *Regulatory Beneficiaries and Informal Agency Policymaking*, 92 CORNELL L. REV. 397 (2007).

137. Parties have not yet filed substantive briefs in the two existing challenges to the ACE rule before the D.C. Circuit Court of Appeals. It will be worth revisiting this proposition once they do, but it is unclear what major-questions-doctrine arguments they could make to support their position that the rulemaking was procedurally or substantively unlawful.

138. Mendelson, *supra* note 136, at 414.

139. *Id.* at 419 (“Under a civic republican or neopluralist model, each of which takes an agency-centered approach to legitimacy, a regulatory beneficiary would want the opportunity to supply information to the agency and to participate fully in the agency’s decision-making process. In a neopluralist model, participation would help ensure that the agency considers (and aggregates) the full range of interests. In a civic republican model, participation by all affected groups, including regulatory beneficiaries, would increase the likelihood that the agency’s process will thoroughly engage relevant viewpoints and that the agency’s decision will thus be perceived as legitimate.”).

140. *Id.* at 419-20.

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But when it comes to regulatory beneficiaries—here environmental groups and those affected by climate change over the short- and long-term—the major questions doctrine cuts off “access to agency processes,” for the doctrine makes it riskier for agency lawyers and policymakers to consider regulatory beneficiaries’ views. Moreover, the doctrine diminishes what Eskridge calls “institutional or process values, such as . . . deliberation.”¹⁴¹ Agencies, through the experts they employ and their public comment processes, are more publicly deliberative than courts.¹⁴² And when courts usurp power from agencies in the manner described above, courts make the administrative decision-making process less deliberative. As a result, Professor Blake Emerson has argued that, in relying on the major questions doctrine, “the Court blinds itself to sources of popular input that may legitimate an administrative agency’s economically or politically significant policy choice.”¹⁴³

In addition, the doctrine’s privileging of regulated parties over regulated beneficiaries also presents legal problems. In particular, the Administrative Procedure Act (APA), in affording “*interested persons* an opportunity to participate in the rule making through submission of written data, views, or arguments,”¹⁴⁴ envisions a regulatory process whereby individuals and organizations can present criticisms and competing views, whether or not the agency is directly regulating their conduct. This vision of “interested” persons’ participation includes both regulated parties and regulatory beneficiaries, where both have a similar opportunity to participate. But the major questions doctrine empowers regulated parties at the expense of regulatory beneficiaries, contrary to the text and spirit of the APA. Whether in environmental rulemakings or other substantive policy areas, generally privileging regulated parties’ preferred statutory interpretations over those of other groups has no textual or purposive basis but, as this case study has shown, is a natural outgrowth of the major questions doctrine. As a result, while it is easy to maintain the regulatory status quo (or even turn back from it), it is far harder for risk-averse agency lawyers to advise their policymaking clients to adopt proregulatory approaches, even when doing so would be consistent with the constitutionally constructive role of agency lawyers as purposivists, or the alternative vision of agency lawyers as textualists.

The final *ex ante* concern with the major questions doctrine is that agency lawyers are left to guess what judges might think constitutes a major question. Speculation is necessary because the Supreme Court has not clearly defined the term, and some judges use the major questions doctrine as a means to express

141. Eskridge, *supra* note 7, at 580.

142. See Blake Emerson, *Administrative Answers to ‘Major Questions’: On the Democratic Legitimacy of Agency Statutory Interpretation*, 102 MINN. L. REV. 2019, 2025 (2018) (arguing that “agencies’ procedural mechanisms and institutional position can promote deliberative, inclusive, and rational decision-making”).

143. *Id.* at 2083.

144. 5 U.S.C. § 553(c) (2018) (emphasis added).

policy preferences, not legal ones. As discussed above, the judges of the D.C. Circuit announced widely divergent opinions on what constitutes a major question during the CPP oral argument. Then-Judge Kavanaugh thought that the CPP clearly constituted such a situation. He even cited critics of the major questions doctrine who worried that the doctrine may be invoked in the CPP litigation.¹⁴⁵ Then-Judge Kavanaugh strongly believed that the major questions doctrine was triggered because of the economic and political significance of the regulation, and used the language of the doctrine to make emphatic policy arguments against any environmental regulation that imposes costs on fossil-fuel reliant communities. As he said during oral argument, because of the rule, “lots of people [could] lose their jobs, lose their livelihoods” and “whole communities are going to be left behind.”¹⁴⁶ Judges Griffith and Tatel, on the other hand, were of the view that the CPP was far from “transformative.”¹⁴⁷ Rather, they noted that the CPP was merely a modest acceleration of the direction the electricity sector was already headed.¹⁴⁸

How could judges disagree on the supposedly objective question of whether a case involves a major question? One possibility is that the Supreme Court and the courts of appeals have not established a clear-enough standard of what constitutes a major question, leading judges to use their own measures. This ambiguity inherently leads to subjectivity. While it is clear from the CPP oral argument that this ambiguity causes predictability concerns *ex post*, the *ex ante* predictability concerns may be just as significant. Without a clear standard for what constitutes a major question, risk-averse agency lawyers who seek to avoid losing in court may interpret statutes even more narrowly than under a clear-cut major questions doctrine standard. Furthermore, the lack of a clear standard increasingly empowers regulated parties to take advantage of these lawyers’ incentives, above even a more well-defined major questions doctrine. As a result, agency GCs are less able to play the constitutionally constructive role of purposive statutory interpreters, or even textual statutory interpreters. Finally, when judges use the major questions doctrine to express policy preferences, agency lawyers may face pressure to adopt judges’ policy preferences, rather than those of Congress. This phenomenon is unjustifiable from a separation of powers perspective, regardless of the substantive policy area in which it occurs and regardless of one’s views on the administrative state or statutory interpretation.

145. Oral Argument at 46, *In re Murray Energy Corp.*, 788 F.3d 330 (D.C. Cir. Sept. 27, 2016).

146. *Id.* at 63.

147. *Id.* at 5-6.

148. *Id.* at 6-7.

IV. Illusory Benefits of the Major Questions Doctrine and Corrective Action

While I have discussed some of the major questions doctrine's most negative effects, the doctrine is of course not without its proponents—both those generally opposed to the *Chevron* deference regime and those generally in favor of it. In this Part, I discuss the flaws with the arguments in favor of the major questions doctrine and argue that the Court should abandon the doctrine in its current form, especially since it has not announced it in a clear or predictable way. Beyond simply abandoning the doctrine, I also recommend ways to cabin some of the most troubling ex ante impacts of the major questions doctrine, including ways that the Court could better define what constitutes a major question. But assuming that the Court continues to rely on the doctrine, I also discuss legislation that would allow the political branches to reclaim the interpretive authority that they are better equipped to hold.

A. Counterarguments in Favor of the Doctrine

In this Section, I address four potential counterarguments—arguments that the major questions doctrine carries normative ex ante or ex post weight and arguments that the major questions doctrine is an imperfect but necessary tool in the complex world of agency statutory interpretation. Specifically, I argue that these counterarguments suffer from logical circularities, line-drawing problems, and errors in strategic judgment, among other problems.

First, a logical place to begin is then-Judge Stephen Breyer's view on the application of *Chevron*, which Justice O'Connor later cited in the *Brown & Williamson* majority opinion. As Breyer wrote, "Congress is more likely to have focused upon, and answered, major questions, while leaving interstitial matters to answer themselves in the course of the statute's daily administration."¹⁴⁹ This principle continues to animate the major questions doctrine, but it has been called "conclusory."¹⁵⁰ While Breyer's point may be correct in certain circumstances, it is also possible to envision scenarios where Congress intentionally delegates larger interpretive questions to agencies. In particular, Congress may do so if it believes that a certain issue requires frequent reexamination and policy change, with either speed or expertise that the executive branch uniquely possesses.¹⁵¹ This is just the kind of scenario illustrated by the CPP case study. Further, scholars have shown that members

149. Stephen Breyer, *Judicial Review of Questions of Law and Policy*, 38 ADMIN. L. REV. 363, 370 (1986); see also *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 159 (2000).

150. Richardson, *supra* note 19, at 391.

151. See, e.g., *Massachusetts v. EPA*, 549 U.S. 497, 532 (2006) (stating that, in drafting the CAA, Congress understood that, "without regulatory flexibility, changing circumstances and scientific developments would soon render the Clean Air Act obsolete").

of Congress and their staffs are aware of *Chevron* deference and thus know that drafting vague statutes will empower agencies to a certain degree.¹⁵²

The second argument in favor of the major questions doctrine is that it prevents agency aggrandizement “so serious that it outweighs *Chevron*’s general benefits.”¹⁵³ To the degree one sees agency aggrandizement as a concern, this justification for the major questions doctrine may seem appealing. But Professor Daryl Levinson has argued persuasively that agency aggrandizement is far from a common motivating factor among agency officials:

Unlike dictators, democratic representatives do not benefit directly from expanding the wealth or power of government institutions. Also unlike dictators, but just like corporate managers, democratic representatives are highly responsive to, and constrained by, the interests of their constituents. These two observations lead to the methodological prescription that predictions of government behavior should be based primarily on constituent-driven political pressures brought to bear on government officials and secondarily on the set of independent interests these officials might realistically pursue in the space afforded them by democratic agency slack.¹⁵⁴

Moreover, even if agency aggrandizement actually motivated agency actors, an agency-aggrandizement justification raises line-drawing problems of its own: precisely when is agency aggrandizement a serious enough concern to call *Chevron* into question?¹⁵⁵ In practice, it is difficult to examine the CPP case study, for example, and conclude that EPA lawyers acted principally to enhance their—or even their agency’s—power. More likely, they were motivated by a desire to avoid damaging losses in court.¹⁵⁶ Moreover, just as one could tell a story of agency lawyers motivated by enhancing agency power, the theory of agency lawyers who become expert in their agency’s authorizing statutes, discussed in Part II *supra*, is at least as theoretically sound as the agency-aggrandizement view. And under the former theory of agency lawyers, even textualists may prefer an interpretive scenario in which agency lawyers rely on their expertise regarding congressional intent to an interpretive scenario

152. Gluck & Bressman, *supra* note 45, at 902, 1003 (showing that *Chevron* is one of the few doctrines about which Congressional drafters are generally aware, but later showing that Congressional drafters report that they attempt to resolve major questions themselves notwithstanding the difficulty of defining that term).

153. Richardson, *supra* note 19, at 398.

154. Daryl J. Levinson, *Empire-Building Government in Constitutional Law*, 118 HARV. L. REV. 915, 922 (2005).

155. Another and perhaps more narrowly tailored solution to this question can be found in Chief Justice Roberts’s dissent in *City of Arlington v. FCC*, 569 U.S. 290, 323-25 (2013) (Roberts, C.J., dissenting) (arguing that *Chevron* deference should be denied when agencies interpret a statute to determine whether that agency has jurisdiction over a particular issue or area).

156. At times, avoiding damaging losses in court might overlap with avoiding the loss of agency power. But this overlap is different from an agency aggrandizement theory, which assumes agency actors focus on affirmatively enhancing the power of their agency whenever possible.

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in which judges rely on a “dice-loading” or substantive canon that can run counter to Congress’s intended purpose. As Judge Amy Coney Barrett has written:

A judge applying a substantive canon often exchanges the best interpretation of a statutory provision for a merely bearable one. In doing so, she abandons not only the usual textualist practice of interpreting a statute as it is most likely to be understood by a skilled user of the language, but also the more fundamental textualist insistence that a faithful agent must adhere to the product of the legislative process, not strain its language to account for abstract intention or commonly held social values.¹⁵⁷

In the CPP case study, there is a strong argument that just this phenomenon occurred. A natural reading of the statute and its context suggests that the agency had broad authority, including to regulate beyond the source itself. But the major questions doctrine led to an interpretation that relied more on an “abstract intention” or perceived “social value” about the manner in which Congress delegates authority than on congressional intent in this particular statute.

The third argument in favor of the major questions doctrine is that it promotes the principle that agencies should not interfere with Congress while Congress is actively legislating on a given subject. The noninterference rationale is likely the most accurate proxy for when an agency is attempting to usurp power that Congress believes it possesses.¹⁵⁸ But it too has two significant problems. First, as the CPP case study illustrates, courts and agency lawyers do not just rely on the major questions doctrine when Congress is actively legislating; the CPP dealt with a decades-old statute that the EPA had relied on since enactment. Second, the noninterference principle may not actually overlap with issues of major economic and political significance as much as its proponents suggest. For example, Congress could be actively legislating on an issue that is neither politically salient nor economically costly. In that scenario, one might argue that the agency should refrain from regulating in a novel way, but that is not the major questions doctrine. Third, a noninterference rationale creates an incentive for a Congress opposed to agency action in a given area to “actively legislate” as a pretext for preventing agency action. Fourth, it is unclear precisely what it means for Congress to be “actively

157. Barrett, *supra* note 48, at 124 (citing John F. Manning, *Textualism and the Equity of the Statute*, 101 COLUM. L. REV. 1, 124 (2001) (“If textualists believe, moreover, that statutes mean what a reasonable person would conventionally understand them to mean, then applying a less natural (though still plausible) interpretation is arguably unfaithful to the legislative instructions contained in the statute.”)).

158. Abigail R. Moncrieff, *Reincarnating the “Major Questions” Exception to Chevron Deference as a Doctrine of Noninterference (or Why Massachusetts v. EPA Got It Wrong)*, 60 ADMIN. L. REV. 593, 632 (2008) (arguing that the noninterference rationale is normatively persuasive because agencies should not regulate when doing so “would interfere with or harmfully duplicate a congressional bargain”).

legislating.” In divided government, does the fact that a minority party in Congress dislikes a statute and repeatedly proposes but fails to repeal it constitute “actively legislating”? In the CPP case study, should the then-current Congress’s perceived disapproval of the CPP have been a factor in a court’s review? Or is the only Congress that matters the Congress that passed the statute? These questions make the noninterference rationale difficult to justify in practice.

The final argument in favor of the major questions doctrine is a strategic one: without it, the Supreme Court would likely overturn *Chevron*.¹⁵⁹ This argument, while provocative, suffers from critical strategic errors. First, ending *Chevron* is not inevitable. While current Supreme Court justices have criticized *Chevron* to varying degrees, articulating an alternative principle that is an improvement over the status quo from both a separation of powers perspective and an administrability standpoint is difficult. For example, a ruling that *Chevron* is inconsistent with the APA would leave open the question of how precisely courts should review agency interpretations of ambiguous statutes. This ambiguity would be particularly problematic in cases where technical expertise that judges tend to lack is a critical part of de novo review—as seems to be the case with the CAA in the CPP case study.

The Court could also overrule *Chevron* on constitutional grounds, bringing about a return to the nondelegation doctrine. Notwithstanding the questionable constitutional necessity for that alternative,¹⁶⁰ it would fundamentally transform our system of government in ways that even the most fervent *Chevron* opponents may find untenable.¹⁶¹ In the CPP case study, imagine Congress dealing with the level of detail that EPA addressed in the technical and legal documents it released with the proposed and final rules. Second, it is not clear why relying on a tool (perhaps in addition to other tools) as a means to limit *Chevron* necessarily precludes the full-scale termination of *Chevron*. Based on the CPP case study and the D.C. Circuit oral argument, one could theorize that Justice Kavanaugh, for example, sees the major questions doctrine as a step towards *Chevron* repeal, rather than an end in itself.

159. Richardson, *supra* note 19, at 420 (arguing that the doctrine is a “*Chevron* safety valve . . . in cases where the *Chevron-Marbury* tension is most salient” and a *Chevron* “fig leaf” in high profile cases because it “hides *Chevron* from view”).

160. See, e.g., Jonathan R. Siegel, *The Constitutional Case for Chevron Deference*, 71 VAND. L. REV. 937, 937 (2018) (disagreeing with the idea that *Chevron* deference removes “independent judgement” from courts and arguing that “[t]he power implicitly delegated to an agency by an ambiguous statute is not the power to interpret the statute, but the power to make a policy choice within the limits set by the possible meanings of the statute.”); Cass R. Sunstein, *Nondelegation Canons*, 67 U. CHI. L. REV. 315, 322 (2000) (arguing that while the Supreme Court has not struck down a statute on nondelegation grounds since 1935, the Court also never struck down a statute on nondelegation grounds until that same year).

161. See, e.g., Harold J. Krent, *Delegation and Its Discontents*, 94 COLUM. L. REV. 710, 728 (1994) (arguing that even if Congress attempts to pass only extremely directive rules, certain kinds of “subsidiary rules” will be necessary to the executive branch’s law enforcement and regulatory functions).

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B. Solutions to the Major Questions Doctrine's Ex Ante Impacts

Because the arguments in favor of the doctrine fall short of justifying its damaging ex ante impacts, one of the three branches of government would be well-served to mitigate these impacts. Optimally, the judiciary itself would correct the problem it created. Short of simply overruling itself (which it should), the Supreme Court could cabin the doctrine in several ways, based on lessons learned from the CPP case study. At the most basic level, the Court could clarify that the major questions doctrine never applies when a delegation is clear. The Court could also clearly define what constitutes a major question. This change would begin to address the democratic and public-values concern that the doctrine provides regulated parties with a roadmap to invalidate agency interpretations by invoking *any* colorable argument that a regulation deals with an issue of political or economic significance. But this change would be difficult to accomplish in practice because so many regulations (and regulations that are litigated in particular) could be considered major. Moreover, even if such a change were possible, this change alone would not be sufficient to eliminate the ex ante objectivity and predictability concerns with the doctrine. With regard to objectivity, if the Court is to continue to rely on the doctrine, it would be well-served to utilize the doctrine when agencies make deregulatory policy changes, in addition to when agencies shift towards more regulation. For example, if an agency chooses to regulate with less stringency than it has in the past, and if litigants are able to establish that the regulation deals with an issue of major political or economic significance, that regulatory change could be reviewed de novo rather than under *Chevron*. Since *UARG*, no court has used the major questions doctrine in this way, nor has any court explicitly ruled out doing so.¹⁶² Of course, even a doctrine that was more objective in that it evaluated regulatory and deregulatory agency action with equal force would still strive to answer the almost unanswerable question of what makes a regulation major.

The Court could also make the doctrine more predictable by applying it only to interpretations of statutes that were passed after the Court announced the major questions doctrine in *UARG*. The rationale for such a limitation is that Congress is now on notice that it ought to be explicit when it delegates authority to agencies on questions of major political or economic significance (assuming the Court gives Congress a clear definition of what constitutes an issue of major political or economic significance in the first place). But prior to the Court announcing the doctrine, Congress may have used broad statutory language in delegations when it intended to allow an agency to use that authority to address future, unknown problems, as was the case in the CAA. Some may argue that the onus should be on Congress to clarify its past

162. This recommendation may also require overturning other precedents because judicial review of agency inaction is generally “extremely limited” and “highly deferential.” *Massachusetts v. EPA*, 549 U.S. 497, 527-28 (1997) (internal citations omitted).

ambiguous delegations on issues of major political or economic significance. But this argument is inconsistent with the rule that the enacting Congress's intent controls in matters of statutory interpretation and is detached from the realities of the contemporary Congress's stagnation.

Finally, the Court could address the critique that the doctrine leads to less deliberative policymaking by invoking it only when the agency regulatory process was insufficiently deliberative. For example, as Emerson has argued, the Court could defer to major agency interpretations of ambiguous statutes only if “the agency has responded to the affected public in making its policy choice” and “the agency has addressed the relevant questions of political value.”¹⁶³ Under this standard—which shares a process-oriented focus with the *Mead* rule that *Chevron* deference is largely reserved for regulations that have gone through notice and comment—as long as EPA lawyers adequately addressed industry concerns in the final rule and the accompanying legal analysis, EPA lawyers would have had significantly more leeway to advise policymakers in favor of adopting a proregulatory approach, consistent with either a purposive or textual vision of agency lawyers.¹⁶⁴

Of course, it seems unlikely that the current Court will reverse course. As a result, the political branches should do what they can to reclaim the interpretive authority that is rightly theirs. The CPP case study illustrates that executive-branch policymakers and lawyers can do little on their own to diminish the effect of the major questions doctrine. Compelling purposive and even textual arguments under *Chevron* are not enough. Similarly, while agency GCs could choose to focus more on expansive proregulatory interpretations notwithstanding the risks, it is difficult to expect an agency lawyer to do so when the risk of losing in court is sufficiently high.

This leaves legislation—passed by Congress and signed by the President—overturning or cabining the major questions doctrine as the best available option for policymakers concerned about the doctrine's corrosive effects. In 2016, the House of Representatives passed the “Separation of Powers Restoration Act of 2016,”¹⁶⁵ which would have amended the APA to require courts to “decide de novo all relevant questions of law, including the interpretation of constitutional and statutory provisions.”¹⁶⁶ Legislation overturning or cabining the major questions doctrine could be modeled off of this legislation by prohibiting courts from considering the economic or political significance of agency statutory interpretations when deciding under which standard to review those interpretations, or by adopting one of the cabining

163. Emerson, *supra* note 142, at 2028.

164. In fact, under this standard, the final rule's accompanying legal analysis sufficiently addressed industry's concerns with building blocks 2 and 3, most of which are the same arguments it would have needed to make with respect to building block 4.

165. Separation of Powers Restoration Act of 2016, H.R. 4768, 114th Cong. (as passed by House, July 12, 2016).

166. *Id.*

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methods discussed earlier in this section.¹⁶⁷ If the 2020 election brings electoral change, policymakers should look for ways to pass legislation like this—legislation that would halt regulated parties' and the judiciary's usurpation of critical interpretive authority from the political branches.

Conclusion

The CPP rulemaking is just one case study, but the major questions doctrine's ex ante effects throughout the case study illustrate what is likely to come—not just in environmental rulemakings but also in high-profile rulemakings generally—if the courts travel down the preferred path of major-questions-doctrine advocates. This reality is highly problematic, even if the Court relies on the doctrine only infrequently. Based on their incentives, agency lawyers will likely push agency policymakers in a deregulatory direction, even if doing so is contrary to statutory text or purpose, and even if those lawyers believe they ought to play a purposive role that would prioritize a different regulatory course. While this result might please those who are ideologically committed to a deregulatory agenda, it should be of deep concern to everyone else, including those who believe that regulation should be the result of agency deliberative processes, not simply dictated by regulated parties, and those who believe agency lawyers play an important textual or purposive role in the separation of powers scheme. After all, agency lawyers and technical experts, accountable ultimately to a democratically elected president and the population at large through deliberative processes, are better equipped to hold this authority than regulated-party lobbyists or the far-off threat of “black-robed rulers overriding citizens' choices.”¹⁶⁸

167. If such a bill became law, the Court could still overturn *Chevron*. As a result, some may argue that in amending the APA, Congress should also codify *Chevron*. But the legislation discussed here—simply instructing courts to apply the same standard whenever they interpret ambiguous statutes or cabin the major questions doctrine in another modest way—could be cast as a technical fix to a judicial doctrine that has caused significant objectivity, predictability, and democratic and public-values problems. Codifying *Chevron*, on the other hand, would likely attract far more attention, given past congressional interest in legislation to repeal it. This is not to say that the legislation discussed here would pass easily, particularly given the sixty-vote threshold in the Senate. But with a different Administration and potentially more votes in the Senate, this is the kind of provision that might succeed if attached to spending legislation or another more politically salient statute.

168. *Janus v. American Fed'n of State, Cty. & Mun. Emps.*, 138 S. Ct. 2448, 2502 (2018) (Kagan, J., dissenting).